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"But They're Already Paid": Payments In-Kind, College Athletes, and the FLSA

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I. INTRODUCTION

A common refrain exists in most discussions regarding the potential right for National Collegiate Athletic Association ("NCAA") college athletes to be paid for their services: the argument that college athletes are already paid by virtue of their receipt of in-kind benefits including room and board, daily meals, and a full athletic scholarship.[1] According to these commentators, college athletes do not need to be compensated with any kind of wage, salary, or stipend beyond what they already receive because what they already receive is more than enough to fairly compensate them for the services they provide to their college or university.

But despite the multitude of opinions arguing the benefits of such in-kind compensation made along ethical and policy lines,[2] little attempt has been made to discuss the legality of such payments under federal and state employment law. While it is clear to most scholars that the efforts by the NCAA, conferences, and member institutions to fix compensation to athletic scholarships and cost-of-living would violate antitrust law but for the "ample latitude" given

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[1] *See, e.g.*, Rick Burton, *NCAA Athletes Are Already Paid and Paid Handsomely*, BUS. INSIDER (Apr. 13, 2012), https://www.businessinsider.com/ncaa-athletes-are-already-paid-2012-4; Chrissy Clark, *NCAA Players Already Get Paid. It's Called Free Tuition*, FEDERALIST (Aug. 8, 2019), https://thefederalist.com/2019/08/08/ncaa-players-already-get-paid-its-called-free-tuition/; Jeffrey Dorfman, *Pay College Athletes? They're Already Paid Up to $125,000 Per Year*, FORBES (Aug. 29, 2013), https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#2a013cf02b82; Terry Frei, *College Athletes Are Already Paid*, DENVER POST (Feb. 2, 2014), https://www.denverpost.com/2014/02/02/frei-college-athletes-are-already-paid/; Todd Jacobs, *College Athletes Are Already "Paid"*, HARTFORD COURANT (Apr. 3, 2019), https://www.courant.com/opinion/letters/hc-le-jacobs-murphy-athletes-20190403-20190403-cihztzifx5frnhpxa3whtv6324-story.html. These arguments have been buoyed significantly by NCAA stakeholders themselves. For example, University of Mississippi Vice Chancellor for Intercollegiate Athletics Keith Carter and Clemson University athletic director Dan Radakovich each testified to the purportedly high "payment" already given to college athletes through scholarships and other benefits in two separate congressional hearings regarding potential college-athlete name, image, and likeness legislation. *See infra* notes 68–69 and accompanying text.

[2] *See, e.g.*, C. Peter Goplerud, III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081 (1997); Ellen Staurowsky, *College Athletes' Rights in the Age of the Super Conference: The Case of the All Players United Campaign*, 7 J. INTERCOLLEGIATE SPORTS 11 (2014); Abigail Hess, *Majority of College Students Say Student-Athletes Should Be Paid, Survey Finds*, CNBC (Sept. 11, 2019), https://www.cnbc.com/2019/09/11/student-athletes-should-get-paid-college-students-say.html; Brian Rosenberg, *How the NCAA Cheats Student Athletes*, N.Y. TIMES (Oct. 3, 2017), https://www.nytimes.com/2017/10/03/opinion/how-the-ncaa-cheats-student-athletes.html?module=inline.

to amateurism restrictions by the courts,[3] a complete picture of the potential legal liability for institutions under wage-and-hour laws is still unclear.

This Article is framed by a basic assumption: that college athletes will soon be declared by the courts to be statutory employees of their colleges or universities under the federal overarching wage-and-hour statute: the Fair Labor Standards Act ("FLSA"). While, as of this writing, that assumption is still decidedly an unresolved question of law (and one that may be rendered moot by Congressional action), this assumption is particularly relevant and temporally warranted given the open window left by three recently decided FLSA cases—along with an additional recently filed lawsuit—that collectively have left open the idea that revenue-sport college athletes may be employees of their colleges and universities under FLSA definitions of employment.[4]

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[3] *See, e.g.*, Thomas A. Baker, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661 (2018); Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big Time" College Athletics: The Need To Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1 (2000); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24 (2000); *see also* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) (writing that the NCAA, which "plays a critical role in the maintenance of a revered tradition of amateurism in college sports," needs "ample latitude to play that role" and that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act"); Agnew v. NCAA, 683 F.3d 328, 342–43 (7th Cir. 2012) (interpreting *Board of Regents* to hold that "when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' . . . the bylaw will be presumed procompetitive"). *But see* O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015) (finding that the Supreme Court's "long encomium to amateurism" in *Board of Regents* "though impressive-sounding, was . . . dicta" and holding that they "are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid").

[4] *See* Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (affirming dismissal of a former University of Southern California ("USC") football player's claims against the NCAA and Pac-12 as "the NCAA and the PAC-12 were not [the plaintiff's] employers," but stating that the "pure question of employment" and whether the plaintiff "had employment status as a football player" as an employee to USC "is left, if at all, for another day"); Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016) (finding that two University of Pennsylvania track-and-field athletes are not employees of their schools or the NCAA); Livers v. NCAA, No. 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018) (denying an NCAA and Villanova University motion to dismiss an FLSA complaint filed by a former Villanova college athlete, instead holding that the plaintiff had "alleged sufficient facts to plausibly state his entitlement to relief under the FLSA" and allowing the case to proceed to limited discovery); Complaint, Johnson v. NCAA, No. 2:19-cv-05230 (E.D. Pa. Nov. 6, 2019) (claiming that, as a former football player at Villanova University, the plaintiff was an employee of Villanova and the NCAA as joint employers and thus entitled to minimum wage under the FLSA). For an overview of the holdings and current status (as applicable) of these cases, see *infra* Section II.A. *See also* Thomas Baker, *Narrow Decision Favoring NCAA and Pac-12 Fails To Resolve Whether College Athletes Are Employees*, FORBES (Aug. 15, 2019, 8:00 AM), https://www.forbes.com/sites/thomasbaker/2019/08/15/narrow-ninth-circuit-decision-favoring-

With this assumption in mind, this Article will explore that common argument that college athletes are "already paid" by determining whether the current compensation afforded to college athletes satisfies federal wage and hour law through application of the FLSA's in-kind compensation provisions to the in-kind benefits given to college athletes by their colleges and universities. While this Article focuses exclusively on base-level legal judgments about the applicability of these in-kind benefits to federal employment law, it invites future research as to whether, given the "reasonable costs" of such benefits, schools comply with minimum wage restrictions even without paying college athletes. In doing so, this Article will focus on the applicability to the FLSA minimum wage requirements of three primary in-kind benefits provided by institutions to their college athletes that employees in other contexts generally do not receive to such a degree: food, lodging, and college tuition.

This Article invites future research into the next step of determining whether college athletes are "already paid" under federal wage and hour law. Future research can quantitatively explore whether the benefits demonstrated here as likely to satisfy the five Department of Labor ("DOL") requirements would be enough to satisfy FLSA obligations for minimum wage and overtime, given the hours that college athletes perform "work" for their university "employers." This analysis is particularly important in today's environment of intercollegiate sports, as it may allow for the potential preservation of NCAA amateurism restrictions and the current "collegiate model"[5] through collective bargaining and the nonstatutory labor exemption.[6] Whether a path to the

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the-ncaa-and-pac-12-fails-to-resolve-whether-college-athletes-are-employees/#7ed54830312a (discussing the Ninth Circuit decision in *Dawson* and how that decision leaves open the question of whether college athletes are employees of their schools for future litigation); *see also generally* Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77 (2019) (discussing the *Berger*, *Dawson*, and *Livers* cases and the potential ramifications of holding college athletes as employees under the FLSA on the current landscape of intercollegiate athletics); Marc Narducci & Nick Vadala, *Ex-Villanova Football Player Files Lawsuit Against NCAA for Not Paying Student-Athletes*, PHILA. INQUIRER (Nov. 7, 2019, 3:15 PM), https://www.inquirer.com/news/ncaa-lawsuit-paying-student-athletes-trey-johnson-villanova-football-20191107.html (summarizing the *Johnson v. NCAA* complaint, which was filed after the publication of Ehrlich, *supra*).

[5] *See* Press Release, NCAA, Board of Governors Starts Process To Enhance Name, Image and Likeness Opportunities (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities (announcing the NCAA's plans to "permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness in a manner *consistent with the collegiate model*" (emphasis added)).

[6] *See* Ehrlich, *supra* note 4, at 110–11 (arguing that "collective bargaining may be a way for the NCAA to solve many of the problems" created by application of the FLSA to college athletes, as it would allow for the use of the nonstatutory labor exemption to prevent future antitrust litigation attacking restrictions on college-athlete pay). While allowing college athletes to unionize and receive wage payments would obviously mean that NCAA regulations are no longer

preservation of amateurism would be a positive development for college sports is a matter of debate, but this Article encourages further discussion on this topic by attempting to answer once and for all whether college athletes are, in fact, "already paid."

Part II of this Article looks at the possibility of transitioning college athletes to FLSA employees by providing a summary of recent FLSA litigation challenging college-athlete employment status and by giving an overview of what in the standard college–athlete compensation package could be used as FLSA credit. Part III of this Article will then provide a primer on § 3(m) of the FLSA, which "allows an employer to count the value of food, housing, or other facilities provided to employees towards wages under certain circumstances,"[7] and reviews generally the DOL's five requirements for § 3(m) credit using a recent case as an illustrative case study as to how the five requirements are applied in practice. Finally, Part IV will then apply those five requirements for § 3(m) credit to college-athlete benefits to determine whether what is currently afforded to college athletes by NCAA member institutions would qualify as creditable towards mandated minimum wage and overtime payments under federal law.

II. CONTEMPLATING COLLEGE-ATHLETE EMPLOYMENT

While it is acknowledged that college athletes have not been deemed employees yet, this Part will provide an overview of recent case law pointing towards the idea that, collectively, federal judges may be warming up to the idea that so-called "revenue sports" college athletes may be statutory employees under the FLSA. To that end, this Part also provides an overview of the college-athlete "employment" package to determine what benefits college athletes receive that may be creditable towards minimum wage and overtime under § 3(m).

"amateurism" restrictions (at least under most definitions of the word "amateur"), the nonstatutory labor exemption would at least allow the NCAA and college athletes to collectively bargain measures to protect competitive balance in intercollegiate sports, which—according to the NCAA—will be the biggest problem if and when college athletes are allowed to be paid by schools or by outside third parties for name, image, and likeness rights. *See* Press Release, NCAA, NCAA Statement on Gov. Newsom Signing SB 206 (Sept. 30, 2019, 10:44 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gov-newsom-signing-sb-206 (arguing in response to California Governor Gavin Newsom's signing of legislation allowing college athletes at California schools to profit off of their names, images, and likenesses that "a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide").

7 *Credit Towards Wages Under Section 3(m) Questions and Answers*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/homecare/credit_wages_faq.htm (last visited Sept. 7, 2020).

A. Four FLSA Lawsuits Filed Against the NCAA, NCAA Athletic Conferences, and Member Institutions

The potential application of § 3(m) and the FLSA in general to college athletes is of particular relevance in today's legal climate surrounding intercollegiate athletics due to a sharp rise in litigation and public comment calling for college athletes to be treated as employees under employment law. Indeed, no less of an authority than NCAA President Mark Emmert stated that California's recently-passed "Fair Pay to Play Act" is effectively "a different way of converting students into employees."[8] While the legal accuracy of that statement is certainly up for debate, Emmert's fear is not a new one: the employment status of NCAA college athletes has been hotly debated since Northwestern University football players sought to unionize under the National Labor Relations Act ("NLRA") and collectively bargain employment terms with the athletic department.[9]

While the Northwestern University football players have thus far been unsuccessful at unionizing under the NLRA, the full board decision declining jurisdiction has largely been seen as ultimately not disagreeing with the regional board's conclusion that college athletes are employees; in fact, one commentator observed that the full board decision "did strongly hint that the Northwestern Football players may indeed be employees."[10] This commentator also noted that

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[8] Dana Hunsinger Benbow, *NCAA President Mark Emmert Says Fair Play To Pay Act [sic] Turns Student-Athletes into Employees*, INDIANAPOLIS STAR (Oct. 3, 2019, 8:14 PM), https://www.indystar.com/story/sports/college/2019/10/03/ncaa-president-mark-emmert-responds-california-fair-play-pay-act/3850522002/.

[9] *See, e.g.*, Adam Epstein & Kathryn Kisska-Schulze, *Northwestern University, The University of Missouri, and the "Student-Athlete": Mobilization Efforts and the Future*, 26 J. LEGAL ASPECTS SPORT 71 (2016); William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014); *see also* Nw. Univ., 362 N.L.R.B. 1350 (2015) (overturning the 2014 regional board decision and declining jurisdiction over the Northwestern student-athletes' petition); Nw. Univ., No. 13-RC-121359, 2014 N.L.R.B. WL 1246914 (Mar. 26, 2014) (finding that grant-in-aid student-athletes are employees of their universities under the NLRA). Since that NLRB decision declining jurisdiction, the Board has been inconsistent as to whether it actually does consider student-athletes to be employees under the NLRA, issuing a series of memoranda in 2016 and 2017 that treated NCAA college athletes as employees affected by the NLRA in discussing more specific employment issues. *See* Ehrlich, *supra* note 4, at 108 n.133 (detailing three NLRB advice memoranda treating college athletes as employees—and in some cases outright calling college athletes employees). *See generally* Roger M. Groves, *Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student-Athletes in Private Institutions*, 78 LA. L. REV. 71 (2018).

[10] Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. (forthcoming 2020) (manuscript at 9) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3528713).

"virtually all labor scholars analyzing the issue have likewise concluded that these elite college athletes meet the various legal definitions of 'employee.'"[11] While definitions of employee differ between the NLRA and FLSA,[12] the opinions of these labor scholars alongside the views of the National Labor Relations Board itself certainly give weight to the idea that courts are moving closer towards a finding that college athletes are employees of their schools and/or the NCAA itself.

Efforts to obtain a court decision classifying college athletes as employees under the FLSA have gained traction since the Northwestern decision. Indeed, since the Northwestern decision, no less than four separate lawsuits have been filed by various NCAA college athletes seeking to gain employment rights for NCAA athletes under the FLSA with wide-ranging degrees of success or failure. The latter three lawsuits—which each relate to so-called revenue-sports athletes—each stem in some regard from the somewhat uncertain decision by the Seventh Circuit in *Berger v. NCAA*,[13] a FLSA suit filed by track-and-field athletes at the University of Pennsylvania ("Penn").

1. *Berger v. NCAA* and the Uncertainty Created by Judge Hamilton's Concurrence

In *Berger*, the two track-and-field athlete-plaintiffs contended that Penn, the NCAA, and more than 120 other NCAA Division I institutions violated the FLSA by not paying college athletes the federal minimum wage.[14] After dismissing the NCAA and the other Division I institutions based on a lack of

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[11] *Id.* at 9.

[12] *See* Dawson v. NCAA, 250 F. Supp. 3d 401, 406 (N.D. Cal. 2017) (noting that the Northwestern decision "involve[d] a different statue and different types of parties" to the FLSA claim before them). The way that this district court declined to apply these findings to the FLSA is somewhat odd, however, since, as one commentator noted, Supreme Court precedent has held "that the statutory definition of 'employee' in the FLSA is significantly broader than the definition of 'employee' in other statutes." Ehrlich, *supra* note 4, at 109 n.135; *see also, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (noting the broad scope of the FLSA in writing that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"); United States v. Rossenwasser, 323 U.S. 360, 363 n.3 (1945) (noting then–Senator and future–Supreme Court Justice Hugo Black's statement that the definition of employee under the FLSA is "the broadest definition that has ever been included in any one act"); Donovan v. Agnew, 712 F.2d 1509, 1512 (1st Cir. 1983) (observing the FLSA's broader scope as compared to the NLRA, given that the NLRA definition of employee was later narrowed through amendment by Congress to cover "only persons acting as agents of an employer").

[13] 843 F.3d 285 (7th Cir. 2016).

[14] *Id.* For additional detail as to the facts and procedural history of *Berger*, see Ehrlich, *supra* note 4, at 81–85.

standing,[15] the Seventh Circuit wholly disagreed with the idea that college athletes are employees of their schools, writing that the Supreme Court's notation of the "revered tradition of amateurism" in *NCAA v. Board of Regents*[16] "defines the economic reality of the relationship between student athletes and their schools."[17] According to the Seventh Circuit, the rules prohibiting cash payments to college athletes "define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of collegiate athletics."[18] Along these lines, the Seventh Circuit found that "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA," and thus "student athletes are not employees and are not entitled to a minimum wage under the FLSA."[19]

But *Berger* contained an interesting wrinkle: a concurring opinion filed by Judge Hamilton, which drew a line between the class of college athletes that the plaintiffs represented and other college athletes whom he felt may be in a more favorable position to bring an FLSA claim.[20] While Judge Hamilton agreed with the breadth of the majority opinion, he wrote to "add a note of caution" based on the point that "[t]he plaintiffs in this case were students who participated in track and field at [Penn]," a school that, like the rest of its fellow Ivy League schools, "does not offer athletic scholarships."[21] In the end, Judge Hamilton agreed with the majority on the basis that "track and field is not a 'revenue' sport at Penn or any other school," meaning that "the economic reality and the sometimes frayed tradition of amateurism both point toward dismissal of these plaintiffs' claims."[22]

Notably, however, Judge Hamilton wrote that he was "less confident" that the same reasoning should extend broadly to the college athletes "who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and [Football Bowl Subdivision] football."[23] For those sports, Judge Hamilton wrote that "economic reality and the tradition of amateurism may not point in the same direction" and that "there may be room for further debate" as to whether college athletes participating in these revenue sports are, in fact, FLSA employees.[24]

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15 *Berger*, 843 F.3d at 289 (finding that the college-athlete appellant had not "plausibly alleged any injury traceable to, or redressable by, any defendant other than Penn").

16 468 U.S. 85 (1984).

17 *Berger*, 843 F.3d at 291 (quoting *NCAA v. Bd. of Regents*, 468 U.S. at 120).

18 *Id.* (quoting Agnew v. NCAA, 683 F.3d 328, 343 (7th Cir. 2012)).

19 *Id.* at 293.

20 *Id.* at 294 (Hamilton, J., concurring).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

2. Testing *Berger*'s Concurrence: Applying the FLSA to Revenue Sports

As one legal commentator noted in 2019, Judge Hamilton's concurrence has "create[d] uncertainty as to whether college athletes are employees under the FLSA and whether courts can reconcile an employee classification with the NCAA amateurism rules" despite its entirely unbinding authoritative nature.[25] It would not be long before this uncertainty was tested, as two additional college-athlete FLSA lawsuits—*Dawson v. NCAA*[26] and *Livers v. NCAA*[27]—followed shortly after *Berger*. Both *Dawson* and *Livers* involved so-called revenue-sport athletes: *Dawson*'s plaintiff was a former football player at the University of Southern California ("USC")[28] while *Livers* was filed by a former football player at Villanova University.[29]

Unfortunately, neither *Dawson* nor *Livers* managed to solve the uncertainty left behind by *Berger*; indeed, to the contrary, the two cases together served to further muddle the legal landscape regarding the application of the FLSA to college-athlete compensation. *Dawson* initially appeared to shut the door entirely on the concept of college-athlete employment, as the district court ruled conclusively and decisively that college athletes are not employees as a matter of law under both the FLSA and the California Labor Code.[30] While the district court in *Dawson* acknowledged that the Seventh Circuit's decision in *Berger*, "as out of circuit authority, [was] not binding" on the Northern District of California, the district court still relied heavily on the Seventh Circuit's reasoning, following that court's path to its conclusion almost note-for-note.[31] When faced with Judge Hamilton's concurrence—which the plaintiffs argued opened a window for claims by Division I football players like Dawson—the district court found that this concurrence could not support the weight of the plaintiffs' claims, writing that "Judge Hamilton did not consider, much less find, that football players are 'employees' under FLSA" and instead merely commented "in passing" that he [was] "'less confident' that *Berger*'s broad holding extends to students who receive athletic scholarships to participate in

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25 Christine Colwell, *Playing for Pay or Playing To Play: Student-Athletes as Employees Under the Fair Labor Standards Act*, 79 LA. L. REV. 899, 903 (2019).

26 932 F.3d 905, 907 (9th Cir. 2019).

27 No. 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018).

28 *Dawson*, 932 F.3d at 907.

29 *Livers*, 2018 WL 3609839, at *1.

30 Dawson v. NCAA, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

31 *Id.* at 403, 405–08.

'so-called revenue sports.'"[32] The district court found that this concurrence "did not purport to represent an alternative line of legal analysis" and thus cannot be relied on as a means to distinguish *Berger*.[33]

But as one legal commenter noted after the district court's decision had been appealed to the Ninth Circuit Court of Appeals, *Dawson* contained a seemingly fatal weakness: the "inexplicabl[e] fail[ure]" of Dawson to include his most direct "employer," USC, as a defendant in the complaint; he instead only sued the NCAA and the Pacific-12 Conference ("Pac-12").[34] For this reason, that commentator guessed that the Ninth Circuit hearing the case on appeal could narrow the district court opinion by affirming the decision "on both standing and the absence of USC within the claim" while "revers[ing] the lower court's absolute statement that 'there is simply no legal basis for finding [Division I Football Bowl Subdivision college football players] to be "employees" under the FLSA.'"[35]

In late 2019, the Ninth Circuit did essentially exactly that, affirming the district court's opinion that Dawson's claims fail as a matter of law with respect to holding the NCAA and Pac-12 as his purported employers while significantly narrowing the district court's overall holding that college athletes were in general not employees under the FLSA.[36] The Ninth Circuit threaded this needle by explicitly declining to adopt the district court's reasoning on whether student-athletes could generally be considered employees in any circumstance and instead focusing its analysis on the employment claims against the NCAA and Pac-12 specifically.[37] From the start, the Ninth Circuit stated that since Dawson did not "allege that he was an employee of USC," the court was not in a position to decide "the pure question of employment" or "consider whether [Dawson] had employment status as a football player, nor whether USC was an employer."[38] Reaffirming this limiting language at the end of the opinion, the Ninth Circuit

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32 *Id.* at 406 (quoting Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring)).

33 *Id.*

34 Ehrlich, *supra* note 4, at 90. It is unknown why USC was not included as a co-defendant in the lawsuit. In this previous article, the author speculated that "Dawson did not want to harm his alma mater and instead wanted only to go after the governing conference and the NCAA," but the author has yet to find any evidence in any *Dawson* pleading, oral argument, or otherwise to either confirm (or reject) that theory. *Id.* at 86 n.38. While the Ninth Circuit panel focused heavily on USC's absence at oral argument as a potentially critical failure of Dawson's case, the panel never directly asked why USC was not included (nor was it unilaterally offered by council). *See* Oral Argument, Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (No. 17-15973), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014440.

35 Ehrlich, *supra* note 4, at 98 (quoting *Dawson*, 250 F. Supp. 3d at 408).

36 Dawson v. NCAA, 932 F.3d 905, 907 (9th Cir. 2019).

37 *Id.*

38 *Id.*

distinguished itself from the reasoning of the district court by explicitly declining to adopt the Seventh Circuit's broad view as to the potentiality of an employment relationship between college athletes and their schools, stating in a footnote that they "do not adopt *Berger*'s analytical premises nor its rationales."[39] The question of whether Dawson should have been considered an employee in general by virtue of his status as a college athlete is, according to the Ninth Circuit, "left, if at all, for another day."[40]

So while the Ninth Circuit found that the economic reality of the relationship between Dawson and the NCAA and Pac-12 "does not reflect an employment relationship,"[41] the Ninth Circuit made clear that it did not "express an opinion about student-athletes' employment status in any other context."[42] As another commentator noted in *Forbes Magazine* shortly after the opinion's release, this decision decidedly "left unresolved the question as to whether individual schools employ college athletes" and should only be seen as a "punt[] on the college-athlete employment issue."[43]

While *Dawson* was under review at the Ninth Circuit, a district court in the other lawsuit involving a revenue-sport athlete—*Livers v. NCAA*—made clear that it was much more open to the idea that college athletes may be employees under the FLSA. Indeed, the *Livers* court, in the summer of 2018, issued two opinions within a two-month period that together provided something of a framework to allow for future claims by other college athletes filing in front of that court. In its first opinion, the district court dismissed the plaintiff's original complaint but provided what one commentator called a "roadmap" to a plaintiff victory by defining which multifactor employment test the plaintiffs should rely on under relevant employment law in the Third Circuit.[44] Two months later, the district court found its offered roadmap sufficiently satisfied and allowed the case to proceed to limited discovery in declining to dismiss the amended complaint's contention that Villanova University and the NCAA jointly employed the plaintiff.[45]

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39 *Id.* at 908 n.2.

40 *Id.*

41 *Id.* at 909.

42 *Id.* at 913–14.

43 Baker, *supra* note 4.

44 Ehrlich, *supra* note 4, at 94; *see also* Livers v. NCAA, No. 17-4271, 2018 WL 2291027, at *16 (E.D. Pa. May 17, 2018) (dismissing the plaintiff's complaint without prejudice while disagreeing with *Berger* and *Dawson* that "a multi-factor test is not appropriate for evaluating whether a student athlete is an employee under the FLSA" and instead stating that the multifactor test in *Donovan v. DialAmerica Marketing*, 757 F.2d 1376 (3d Cir. 1985), "may offer a useful starting point for developing rules of analysis for the threshold question of who is an 'employee' at all").

45 Livers v. NCAA, No. 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018).

This discovery was limited to one threshold issue—the statute of limitations—which was viewed at the time to be likely fatal to Livers's claims.[46] Prior to this predicted dismissal, however, Livers was able to add a new lead plaintiff, Villanova teammate Taurus Phillips, who was able to more directly satisfy the statute of limitations and allow the case to proceed to merits discovery on the issue of college-athlete employment.[47] But this victory would be short-lived, as Phillips soon thereafter had to withdraw from the case due to (undefined) "family issues," necessitating a voluntary dismissal with prejudice and ending the case.[48]

While thanks to this dismissal the plaintiffs' early victories in *Livers* did not lead to any conclusive rulings on the possibility of college-athlete employment, in November 2019, yet another former Villanova football player—defensive back Trey Johnson[49]—filed a lawsuit in the same court that had decided *Livers*, making largely the same allegations.[50] This lawsuit, filed by the same attorney that had represented Phillips and Livers, will undoubtedly seek to pick up where Livers and Phillips left off. Given Livers and Phillips's success in that same court and the increasingly employee-like nature of the college-athlete job description, it seems prudent to treat college athletes gaining employment status as—at minimum—a significant possibility and begin to discuss the compensation they currently receive in the context of the FLSA and § 3(m).

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[46] *Id.*; Ehrlich, *supra* note 4, at 90–91. Livers had filed his claim between two and three years after graduating from Villanova University; the statute of limitations for FLSA violations is two years for inadvertent violations but is increased to three years for "willful" violations. *See* Ehrlich, *supra* note 4, at 88 n.51. Even in allowing the case to proceed to discovery, the *Livers* Court expressed doubt that Livers would be able to proceed past the statute of limitations issue, noting that "it is the Plaintiff's burden alone to properly allege 'willfulness' in order to avoid dismissal—which, here, requires Plaintiff to plead facts that, if proven, show that Defendants subjectively believed the [DOL Field Operations Handbook] and case law was wrongly decided." *Livers*, 2018 WL 2291027, at *8.

[47] Pretrial Order at 1–2, Livers v. NCAA, No. 17-4271 (E.D. Pa. May 17, 2018) (granting Livers's motion to substitute and join Taurus Phillips as a party plaintiff and ordering the parties "to discuss merits discovery now that the statute of limitations issue is no longer in the case"); *see also* Ehrlich, *supra* note 4, at 92 n.69 (detailing the addition of Phillips to the Livers claim and discussing the new timeline of the case after the case passed the threshold statute of limitation issue).

[48] Stipulation re: Voluntary Dismissal with Prejudice and Termination of Civil Action at 2, Phillips v. NCAA, No. 2:17-cv-04271 (E.D. Pa. Apr. 2, 2019).

[49] *2016 Football Roster*, VILL. FOOTBALL, https://villanova.com/sports/football/roster/trey-johnson/1121 (last visited Sept. 6, 2020).

[50] Complaint, Johnson v. NCAA, No. 2:19-cv-05230 (E.D. Pa. Nov. 6, 2019); *see also* Narducci & Vadala, *supra* note 4; Robert Iafolla, *NCAA Hit with Another Lawsuit Seeking Pay for Athlete's Play*, BLOOMBERG L. (Nov. 7, 2019, 10:53 AM), https://news.bloomberglaw.com/daily-labor-report/ncaa-hit-with-another-lawsuit-seeking-pay-for-athletes-play.

B. The College-Athlete Benefit Package

The college-athlete "employment" model is quite nonstandard when compared to general employment practices, as college athletes are in many ways forced to take certain benefits as compensation for their athletic performance. Instead of having the ability to negotiate employment terms with college athletes as in the traditional employment relationship, the perks that schools are allowed to grant college athletes are heavily restricted by NCAA guidelines written to limit the compensation afforded to these players.[51] Such guidelines are, according to the NCAA, promulgated to ensure that college athletes remain "amateurs" during their participation in intercollegiate sports "motivated primarily by education and by the physical, mental, and social benefits to be derived" from amateur sport, free "from exploitation from professional and commercial enterprises."[52] As such, NCAA regulations generally forbid schools from providing college athletes with any money or other benefits that exceed "the cost of education" as defined by the NCAA.[53]

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[51] *See generally* NCAA, 2020–21 NCAA DIVISION I MANUAL, https://web3.ncaa.org/lsdbi/reports/getReport/90008.

[52] *Id.* at 3.

[53] *See, e.g.*, *id.* (noting that college athletes "may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution"). This definition was recently forcefully expanded by the Northern District of California in *In re NCAA Grant-In-Aid Cap Antitrust Litigation* (Alston v. NCAA), 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd,* 958 F.3d 1239 (9th Cir. 2020), where Judge Claudia Wilken, in an injunction accompanying a finding that the NCAA has unlawfully restrained competition under the antitrust laws, forbids the NCAA from "agreeing to fix or limit compensation or benefits related to education that may be available from conferences or schools to Division I women's and men's basketball and [Football Bowl Subdivision] student-athletes on top of a grant-in-aid." Permanent Injunction at 1, Alston v. NCAA, 375 F. Supp. 3d 1058 (N.D. Cal. Mar. 8, 2019). Judge Wilken's definition of these benefits includes several items of in-kind compensation, including "computers, science equipment, musical instruments and other tangible items . . . related to the pursuit of academic studies; post-eligibility scholarships to complete undergraduate or graduate degrees at any schools; scholarships to attend vocational school; tutoring; expenses related to studying abroad . . . ; and paid post-eligibility internships." *Id.* at 2. While the NCAA and its member conferences have petitioned for Supreme Court review, their petition to the Court to stay the injunction while the petition for certiorari is pending was rejected by Justice Kagan. *See* Petition for Certiorari, NCAA v. Alston, No. 20-512 (Oct. 15, 2020); Petition for Certiorari, Am. Athletic Conf. v. Alston, No. 20-520 (Oct. 15, 2020). *See also* Daniel Wiessner, *SCOTUS Won't Stay Decision that NCAA Compensation Rules Are Anticompetitive*, REUTERS (Aug. 11, 2020, 12:14 PM), https://www.reuters.com/article/employment-ncaa/scotus-wont-stay-decision-that-ncaa-compensation-rules-are-anticompetitive-idUSL1N2FD1DK.

As detailed in *USA Today* in late 2019, the standard compensation package afforded to college athletes at Division I "Power Five" schools[54] now includes the following perks:

- A full scholarship with an added stipend that reflects the "full cost of attendance," including not only college tuition but also money for room, board, books, fees, transportation, supplies, and "other expenses related to attending the school." Per *USA Today*, these payments have been as much as $5,000 to $7,000 and are determined by a formula promulgated by the federal Department of Education;[55]
- Since 2012, a term to that scholarship that lasts multiple years, commonly until the completion of a degree at the school providing the scholarship;[56]
- Since 2014, unlimited snacks and meals, which are commonly given directly to college athletes at an area near the athletic facility;[57]
- A scholarship provision forbidding schools from withdrawing an athletic scholarship due to an injury or poor performance;[58]

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[54] The "Power Five" conferences refer to the five largest conferences in NCAA Division I competition, which in 2014 were given autonomy to essentially write their own rules in a variety of different areas. Brian Bennett, *NCAA Board Votes To Allow Autonomy*, ESPN (Aug. 7, 2014), https://www.espn.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences. Conferences within this "Power Five" classification include the Atlantic Coast Conference ("ACC"), the Big 12 Conference, the Big Ten Conference, the Southeastern Conference ("SEC"), and the Pacific-12 Conference ("Pac-12"). *Id.* Other conferences are not given the same autonomy and often have fewer benefits available to college athletes.

[55] Kevin Allen, *Here Are Some Benefits NCAA Athletes Already Are Eligible for that You Might Not Know About*, USA TODAY (Oct. 1, 2019, 4:06 PM), https://www.usatoday.com/story/sports/college/2019/10/01/ncaa-football-basketball-benefits-college-athletes-now-can-receive/2439120001/; *see also* 2020–2021 NCAA, *supra* note 51, at 209 (defining sources of institutional financial aid); *Cost of Attendance Q&A*, NCAA (Sept. 3, 2015), https://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa.

[56] Allen, *supra* note 55. *But see* Kevin Trahan, *Do NCAA Schools Really Believe in Multiyear Scholarships?*, VICE (June 29, 2016, 11:01 AM), https://www.vice.com/en_us/article/8qygj5/do-ncaa-schools-really-believe-in-multiyear-scholarships (noting an email sent from former–NCAA vice president David Berst stating that schools should just form "a hush-hush gentleman's agreement to perpetuate the longtime ban" on multiyear scholarships, while noting that there is no evidence that has actually happened).

[57] Allen, *supra* note 55; *see also* Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014, 4:25 PM), http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules.

[58] Allen, *supra* note 55. *But see* Rick Allen, *The Facts About "Guaranteed" Multi-Year NCAA DI Scholarships*, INFORMED ATHLETE (June 12, 2016), https://informedathlete.com/the-facts-about-guaranteed-multi-year-ncaa-di-scholarships/ (detailing exceptions and restrictions on the

- The retained ability to apply for federal grants based on financial need, including but not limited to Pell Grants, which were worth a maximum of $6,195 for the 2019–20 school year with "considerable flexibility on how the money should be spent";[59]
- Access to the NCAA Student Assistance Fund, which helps Division I college athletes "take care of what the NCAA terms 'essential needs' that occur from time to time, regardless of demonstrated general financial need," including, for example, emergency travel, child care, or buying a suit for a job interview;[60]
- Up to four tickets for each regular-season game and up to six tickets for postseason competition;[61]
- Medical coverage for sports-related injuries for up to two years after the athlete graduates or leaves school;[62] and
- Access to the NCAA Degree Completion Award Program, which grants financial assistance to help former college athletes who left school early come back to school and finish their degrees.[63]

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prohibition on coaches taking away scholarships for poor athletic performance, including noting that the prohibition only applies to Power Five schools).

[59] Allen, *supra* note 55; *see also* NCAA, *supra* note 52, at 210 (noting an exception to the maximum limit on financial aid for Pell Grants); Sheridan Hendrix & Ashley Nelson, *Student-Athletes Look to Pell Grants To Subsidize Education*, LANTERN (May 15, 2018), https://www.thelantern.com/2018/05/student-athletes-look-to-pell-grants-to-subsidize-education/. The ability for college athletes to receive Pell Grants has been a major issue in the context of NCAA recruiting violations and the funneling of money to recruits under the table for the past few decades. In 1994, former University of Miami assistant academic advisor Tony Russell was sentenced to three years in prison for helping students illegally receive federal aid through Pell Grants, receiving kickbacks of $85 to $100 from each of the students who received these benefits. Charlie Nobles, *Ex-Adviser Is Sentenced to Jail in Miami Athletes' Fraud Case*, N.Y. TIMES (Mar. 18, 1994), https://www.nytimes.com/1994/03/18/sports/colleges-ex-adviser-is-sentenced-to-jail-in-miami-athletes-fraud-case.html. A Senate Investigations Committee would cite this case in its reporting detailing how the Pell Grant program lost hundreds of millions of dollars to fraud throughout the 1980s. *Id.*; *see also* U.S. GOV'T ACCOUNTABILITY OFF. SPECIAL INVESTIGATIONS, OSI-95-13R, NCAA STUDENT ATHLETE PELL GRANTS (1995).

[60] Allen, *supra* note 55; *see also, e.g.*, STUDENT ASSISTANCE FUND (SAF) GUIDELINES, LIBERTY UNIV., https://www.liberty.edu/media/1912/compliance/SAF_Guidelines.pdf (last visited Sept. 7, 2020) (detailing examples of permissible uses of the fund); David McCoy, *NCAA's Little-Known Student-Assistance Fund*, CBS MINN. (Jan. 12, 2014, 11:17 PM), https://minnesota.cbslocal.com/2014/01/12/ncaas-little-known-student-assistance-fund/.

[61] Allen, *supra* note 55.

[62] *Id.* This benefit generally applies only to Power Five schools, with the exception of the Pac-12, which mandates coverage for up to four years after the student leaves school or when the student turns 26. *Id.* Schools in other conferences may—but are not required to—offer this benefit. *Id.*

[63] *Id.* As of August 1, 2019, "Division I schools are required to pay for tuition, fees and books for men's and women's basketball student-athletes who leave school and then return later to earn

According to many commentators,[64] this compensation package afforded to college athletes by the NCAA and member institutions does constitute payment, and plenty of it. For example, a commentator writing for *Forbes Magazine* estimated college-athletes' compensation, including "a package of education, room, board, and coaching/training," to be "worth between $50,000 and $125,000 per year depending on their sport and whether they attend a public or private university."[65] More recently, a commentator for *The Federalist* noted that over the course of four years, college athletes receive "a $200,000 world-class education, a plethora of gear, access to personalized tutoring, and an entire student-athlete facility."[66] As the *Forbes* commentator noted, "[t]o an economist, this is 'pay.'"[67] Indeed, University of Mississippi Vice Chancellor for Intercollegiate Athletics, Keith Carter, in response to questioning during a July 2020 Senate Commerce Committee hearing on potential name, image, and likeness litigation estimated that the compensation provided to basketball players at his university to be around $68,000–$70,000 per year.[68] A few weeks later, Clemson University Athletic Director, Dan Radakovich, testified to the Senate Judiciary Committee that the combined value of benefits to college athletes within the major NCAA Division I conferences "is between $70,000 to $120,000, per student, per year."[69]

If college athletes at Division I institutions are to be considered employees under federal law, however, such opinions will need to be reconciled with the applicable wage-and-hour law. As the *Berger*, *Dawson*, *Livers*, and

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their degree." *Id.* Both that program and the general NCAA Degree Competition Award Program are only available to college athletes who were in school for at least two years before leaving and who return to school less than ten years after leaving. *Id.*; *see also NCAA Division I Degree Completion Award Program*, NCAA, http://www.ncaa.org/ncaa-division-i-degree-completion-award-program (last visited Sept. 7, 2020) (detailing requirements for award eligibility).

64 *See* sources cited *supra* note 1.

65 Dorfman, *supra* note 1.

66 Clark, *supra* note 1.

67 Dorfman, *supra* note 1.

68 *Exploring a Compensation Framework for Intercollegiate Athletics Before the S. Comm. on Com., Sci., and Transp.* at 1:16:20–1:17:30, 116th Cong. (2020) (statement of Keith Carter, Vice Chancellor for Intercollegiate Athletics, University of Mississippi). Carter stated that this number was based on calculated value of around $42,000 per year in tuition plus $25,000 per year for other benefits, including medical treatment, academic services, and strength and conditioning. *Id.* Carter provided a more comprehensive breakdown of these benefits in his written statement submitted to the hearing record. *See Exploring a Compensation Framework for Intercollegiate Athletics Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 3 (2020) (statement of Keith Carter, Vice Chancellor for Intercollegiate Athletics, University of Mississippi).

69 *Protecting the Integrity of College Athletics Before the S. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of Dan Radakovich, Athletic Director, Clemson University), https://www.judiciary.senate.gov/imo/media/doc/Radakovich%20Testimony.pdf.

Johnson lawsuits have claimed, that applicable law is the FLSA. As such, a necessary first step towards determining whether college athletes are indeed "already paid" under the FLSA to the extent that the law requires is an analysis of the FLSA's rules governing crediting in-kind compensation towards minimum wage and overtime, as articulated in that Act's § 3(m).[70] This analysis is necessary to determine a vital threshold matter: whether the benefits afforded to college athletes—including housing, meals, and athletic scholarships—can even be creditable towards minimum wage under the FLSA.

III. SECTION 3(M)

In order to fully examine § 3(m) of the FLSA to determine its application to the wholly unorthodox benefits afforded to college athletes, one must examine both the original purpose of the statute and its modern application. As such, the following Part looks to provide (1) some historical background on the motivations behind the inclusion of § 3(m) in the FLSA; and (2) discussion of a recent case decided in federal court that provides an overview of the five requirements set forth by case law and DOL guidelines to determine if a benefit is creditable under § 3(m).

A. Background on § 3(m) of the FLSA

The FLSA was signed by President Franklin D. Roosevelt in response to a series of Supreme Court decisions rolling back a series of measures signed into law by President Woodrow Wilson's administration designed to raise living standards for women and children.[71] The original FLSA set the minimum wage at 25 cents per hour and the maximum workweek at 44 hours, and only applied to industries that constituted about 1/5th of the overall workforce.[72]

In its present form, the FLSA sets the minimum wage at $7.25 per hour with time-and-a-half overtime extended to covered employees who exceed 40 hours per week.[73] However, an oft-overlooked section of the FLSA—codified as 29 U.S.C. § 203(m)—defines the term "wage" as including "the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee

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70 *See generally* 29 U.S.C.A. § 203(m) (West 2020).

71 Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22–23 (1978); *see also* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (finding a District of Columbia law fixing a minimum wage for women and children to be unconstitutional as a violation of the due process clause of the Fifth Amendment); Hammer v. Dagenhart, 247 U.S. 251 (1918) (finding a federal law barring the interstate shipment of goods produced by child labor to exceed the constitutional authority of Congress).

72 Grossman, *supra* note 71, at 22.

73 § 206(a)(1)(C); *id.* § 207(a)(1).

with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."[74] This definition, known colloquially as § 3(m), has been interpreted by the DOL as "allow[ing] an employer to count the value of food, housing, or other facilities provided to employees towards wages under certain circumstances."[75]

As one legal scholar noted in 1953, prior to the enactment of the FLSA "the practice between employers and employees of paying and accepting wages in the form of board, lodging, and many other facilities and conveniences instead of cash, was a normal, and, in some sections of the country, a necessary and accepted practice."[76] However, in drafting the FLSA, "Congress recognized that many of these practices were unfair since the charges made by employers for such facilities were excessive, resulting finally in the payment of considerably less than the employee's services were worth, or less than the amount bargained for."[77] As such, Congress inserted § 3(m) into the FLSA's definitions section in order to continue to allow this practice while affording the DOL the opportunity to regulate its abuses.[78]

In the early days of enforcement of the FLSA, it was quickly settled that for facilities to be "furnished" in compliance of the statute the facilities must be "accepted by [the employee] voluntarily and not as a result of compulsion by [the] employer."[79] Along the same lines, various courts interpreting the text of the statute found that for the facilities to have been "customarily furnished" under the terms of the statute the facilities must "have been so furnished regularly by the employer to his employees and where it is a practice to furnish the same or similar items to employees generally in the industry."[80]

While these DOL requirements are focused towards lodging, litigation and regulations have also made it clear that similar requirements apply to a wide variety of other in-kind benefits. In fact, the DOL interpretive regulations make clear that while "other facilities" as defined within § 3(m) "must be something like board or lodging," their examples give a wide scope to the term and include most of the benefits that college athletes generally receive. More specifically, the DOL interpretative regulations defining "other facilities" state that appropriate items for § 3(m) credit include

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74 *Id.* § 203(m).

75 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

76 Herman A. Wecht, *Limitations on Wage Deductions Under the Fair Labor Standards Act*, 14 PITT. L. REV. 233, 233 (1953).

77 *Id.*

78 *Id.*

79 *Id.* at 244.

80 *Id.*

> [m]eals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.[81]

Indeed, even though the DOL regulations primarily focuses their breakdown of the five requirements on housing,[82] both the above-quoted regulations and case law applying these regulations make it clear that the benefits often proffered to college athletes to be discussed—including meals[83] and college scholarships[84]—are both also generally creditable as "other facilities provided" under § 3(m) of the FLSA. These benefits must only be of the type that are "customarily furnished" to other like employees, meaning that they are "regularly provided" to employees as part of a regular compensation package issued by the employer to their employees.[85]

That said, the DOL regulations have made it clear that there are certain threshold requirements that must be met for these facilities to be creditable under § 3(m). Soon after the FLSA's passage, the DOL promulgated regulations interpreting the insertion of the statutory phrase "reasonable cost" as not including facilities "found by the Administrator to be primarily for the benefit or convenience of the employer."[86] As specifically noted in the regulations, "the

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81 29 C.F.R. § 531.32(a) (2020).

82 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

83 *See, e.g.*, Herman v. Collis Foods, 176 F.3d 912 (6th Cir. 1999).

84 *See, e.g.*, White v. Publix Super Mkts., No. 14-cv-1189, 2015 WL 4949837 (M.D. Tenn. Aug. 19, 2015).

85 29 U.S.C.A. § 203(m) (West 2020); *see also* Davis Brothers, Inc. v. Donovan, 700 F.2d 1368, 1370 (11th Cir. 1983) (noting that the FLSA "does not define customarily furnished or otherwise indicate that the phrase is being used in an unusual way" and agreeing with other courts' construction of the "customarily furnished" statutory language to mean "regularly provided").

86 Wecht, *supra* note 76, at 244; *see also* 29 C.F.R. § 531.3(d)(1). While this language seemingly requires a DOL Administrator to make determinations of both applicability based on primary benefit to the employee and "reasonable cost," case law has favorably cited federal regulations allowing the employers to make determinations of reasonable cost themselves, subject, of course, to scrutiny by the courts and the DOL. *See* Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1184 (D. Nev. 2018); *see also* 29 C.F.R. § 531.33(a) (prescribing "three methods whereby

cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages."[87] This requirement makes practical sense, as an employer giving employees items that they need to complete work tasks is not "compensation" for work, but instead merely giving what is necessary to make sure that the job is done to the employer's liking and satisfaction.

A common and easy example of this concept is when employers prescribe specific employee uniforms. In *Arriaga v. Florida Pacific Farms, L.L.C.*,[88] the Eleventh Circuit compared employer-issued uniforms—which are provided as an example under the regulations as clearly being facilities furnished for the primary benefit of the employer—to the furnishing of clothing in general.[89] The court noted that when specific items of clothing are prescribed by the employer as specifically necessary given "the nature of the business" they can only be deemed as primarily for the benefit of the employer and are thus not creditable under § 3(m).[90] However, "if the employer 'merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress,'" whatever clothing is chosen would not be considered uniforms.[91] For example, if the employer requires employees to wear a branded jumpsuit to work, the furnishing of that jumpsuit would not be considered wages since employees would generally not wear that jumpsuit in their everyday life. But if the employer merely requires employees to wear a standard suit and tie, the furnishing of that suit and tie would be considered wages since that suit and tie can be worn in other contexts without anyone necessarily knowing that it was given to the employee as a work uniform.

Section 3(m) is perhaps most commonly applied to the provision of housing benefits to live-in workers in various domestic contexts. For example, in *Lopez v. Rodriguez*,[92] the appellee—a Bolivian citizen and resident alien in the United States—alleged that she had worked for several years without any monetary compensation for her work as a live-in housekeeper for the appellants.[93] While the D.C. Circuit affirmed the district court's opinion finding that the appellants had violated the FLSA by not paying their housekeeper anything in compensation for her services, it reversed the district court decision

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an employer may ascertain whether any furnished facilities are a part of 'wages' within the meaning of section 3(m)" including that "[a]n employer may calculate the 'reasonable cost' of facilities").

87 29 C.F.R. § 531.32(c).

88 305 F.3d 1228 (11th Cir. 2002).

89 *Id.*

90 *Id.* (quoting 29 C.F.R. § 531.32(d)(2)).

91 *Id.* (quoting Ayres v. 127 Rest. Corp., 12 F. Supp. 2d 305, 310 (S.D.N.Y.1998)).

92 668 F.2d 1376 (D.C. Cir. 1981).

93 *Id.* at 1377.

in part by finding that the appellants were at least "entitled to a credit against unpaid wages for 'board, lodging or other facilities' furnished by appellants to appellee," including "room, board, miscellaneous clothing and toiletries, medical expenses, and minimal pocket money."[94]

Focusing its analysis on whether the benefits given to the housekeeper were not only proffered for her benefit but that her acceptance of those benefits were "voluntary and uncoerced," the court found that, when a job is of the "live-in" nature, benefits like housing are always "voluntary and uncoerced" since the employee "ha[s] no choice but to accept the lawful 'live-in' condition if she desire[s] the job."[95] The only way that this presumption can be overturned is if the employer imposes "'coercive' conditions" to receiving the benefit, defined as "conditions so onerous and restrictive that the employee's continued employment and acceptance of board and lodging ceases to be voluntary."[96] As the housekeeper in *Lopez* had at some point become "dissatisfied with her working conditions," the D.C. Circuit remanded the case back to the district court to determine "when, if ever, those conditions became so coercive that appellee's employment with appellants could no longer be regarded as voluntary" as shown by when the housekeeper "would have left the job but for the coercive conditions imposed upon her by appellants."[97]

Including that "voluntary and uncoerced" requirement along with the "primary beneficiary" test and other important requirements, the DOL in modern times has laid out a test comprised of five requirements used to determine whether employers can claim the cost of providing employee in-kind benefits as credit towards wages owed:

> 1. [The in-kind benefits] must be regularly provided by the employer or similar employers;
> 2. The employee must voluntarily accept the [in-kind benefits];
> 3. The [in-kind benefits] must be furnished in compliance with applicable federal, state, or local laws;
> 4. The [in-kind benefits] must primarily benefit the employee, rather than the employer; and
> 5. The employer must maintain accurate records of the costs incurred in the furnishing of the [in-kind benefits].[98]

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94 *Id.* at 1377–78.

95 *Id.* at 1379–80.

96 *Id.* at 1380.

97 *Id.* at 1380–81.

98 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7; *see, e.g.*, Balbed v. Eden Park Guest House, 881 F.3d 285, 288–89 (4th Cir. 2018) (adopting the five DOL requirements as required to be satisfied in order for an employer "to claim the credit for lodging as wages").

B. Applying the Five Requirements in Practice

A 2018 decision by the District Court of Nevada is useful to demonstrate the general applicability of these five requirements in practice. In *Roces v. Reno Housing Authority*,[99] a group of housing maintenance workers entered into "[l]ive-[i]n [a]greements" with their employer, a public housing manager, where they "received rent-free housing in exchange for undertaking the responsibility to perform certain regular work within the complexes they inhabited."[100] While these workers had specific responsibility, a source of contention with their employer was the requirement that they remain on-call—meaning they "must be reachable by telephone and must remain 'close enough to respond within no more than fifteen minutes'"—and available to respond to emergencies outside of working hours, including at nights and around the clock on weekends and holidays.[101] The workers filed suit claiming that this on-call time should have counted as overtime and that, since their unit's maximum rental value was $600, they were effectively only being paid 92 cents per hour.[102]

While the job requirements and compensation packages afforded to housing-maintenance workers certainly differ from the employment profile of a college athlete, the *Roces* case stands as a useful (and recent) case study demonstrating how employers can comply with all five requirements. The case is recent enough to provide a clear picture of the meanings of each of the five requirements under the present state of the law (at least as applied in the District Court of Nevada). Additionally, the court's opinion carefully lays out and applies each part of the five-part test, providing a useful framework to be applied later in the unorthodox context of college-athlete employment.

1. Requirement 1: Benefits Must Be "Regularly Provided by the Employer or Similar Employers"

According to the DOL interpretative regulations, the "regularly provided" requirement of § 3(m) is in place to ensure that employers can only take advantage of § 3(m) credits if the lodging or other benefit is "furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities."[103] This requirement was perhaps best illustrated in the earlier-discussed *Lopez* case involving a live-

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99 300 F. Supp. 3d 1172 (D. Nev. 2018).

100 *Id.* at 1177.

101 *Id.* at 1177–78.

102 *Id.* at 1178.

103 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

in housekeeper—the benefits afforded to such a live-in employee would unquestionably be "customarily furnished" since it is commonly understood that these employees would be compensated in part in such a fashion.[104] Indeed, a DOL fact sheet points to the fact that "live-in domestic service employees (such as home care workers and nannies who live at the home where they provide services) often reside at their employers' private homes without paying rent"; since this benefit is a customary feature of the job at hand, the benefit is "regularly provided" or "customarily furnished" to that class of worker.[105]

However, this analysis can get complicated in one or both of two instances: first, if the employer employs other, non-live-in employees who would not necessarily be regularly provided such a benefit, and second, if the particular job requirements do not necessarily require the employee to live on site. In *Roces*, for instance, the on-site maintenance worker plaintiffs argued that lodging provided by their employer could not be considered "regularly provided" since the defendant "d[id] not provide lodging to its other, non-live-in employees."[106] As the court noted, under this interpretation, § 3(m) would have only applied if the worker provided housing to *all* of its employees, including office workers who need not and do not live on-site at the defendants' various apartment complexes.

Understandably, the court rejected this rather broad interpretation of the requirement, stating that

> neither the language of the statute nor the applicable regulations support so strict a requirement that employers must provide lodging to all of their employees, regardless of the disparate duties associated with different positions, in order to take any credit against wages based on the reasonable cost of such lodging.[107]

Instead, the *Roces* court pointed to a July 10, 1963, DOL Opinion Letter that stated that "it suffices to provide such lodging, regularly and indiscriminately, to all of a *particular class of employee*."[108] Comparison to all employees was not appropriate; only comparison to other like employees was necessary to determine whether such provisions were "customarily furnished."[109] And since the defendants had "consistently provided free lodging to all live-in tenants over the course of approximately 28 years," that was enough to show that the lodging

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104 *See supra* notes 92–97 and accompanying text.

105 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

106 *Roces*, 300 F. Supp. 3d at 1185.

107 *Id.*

108 *Id.* (emphasis added).

109 *Id.*

benefit was regularly provided, even if other employees did not regularly receive the same benefit.[110]

In the context of college employees—including, potentially, college athletes—this distinction is particularly important when considering the varied nature of employees on a college or university campus and how college athletes differ from those employees. Beyond college athletes, universities employ a wide variety of different categories of employees including, for example, academic staff, tenure-track and non-tenured faculty, student-employees (including graduate assistants), and university staff (including administrative support staff and custodial and facility maintenance workers).[111] These more "traditional" university employees commonly receive a lot of the same benefits as college athletes, albeit in different forms. For example, all full-time salaried employees at Florida State University are afforded the opportunity to take up to two courses (six credit hours) per semester, with some restrictions.[112] Similarly, Florida State faculty and staff members are allowed to purchase meal plans for university dining facilities at a lower per-meal rate than the general public.[113]

But, under the *Roces* interpretation of this requirement, the other employees of a college would not be useful comparison to college athletes since they would not be considered within the same "particular class of employee" as the athletes within the collegiate employment apparatus.[114] The relevant comparison would instead would be to other intercollegiate college athletes, both at the same institution and at other institutions.[115]

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[110] *Id.*

[111] *See, e.g.*, *Employee Categories*, UNIV. OF WIS. SYS. HUM. RES., https://www.wisconsin.edu/ohrwd/hr/emplcat/ (last visited Sept. 7, 2020).

[112] *Employee Tuition Scholarship Fund*, FLA. STATE UNIV. OFF. OF HUM. RES., https://www.hr.fsu.edu/index.cfm?page=benefits/benefits_perks/benefits_perks_employee_scholarship (last visited Sept. 7, 2020).

[113] *See* Michael Williams, *Faculty & Staff Meal Plan Updates*, FLA. STATE UNIV. (July 18, 2018), https://announcements.fsu.edu/article/faculty-staff-meal-plan-updates.

[114] *Roces*, 300 F. Supp. 3d at 1185.

[115] As later discussed, defining this "particular class of employees" is both complicated and an undoubtedly unsettled question of law when considering the several different "class[es]" of college athletes, both between institutions and even at the same institution. For example, should Division I college athletes be considered as within the same "particular class of employees" as Division III college athletes? Are walk-on college athletes within the same "particular class of employees" as scholarship college athletes? Most critically—and most relevant to the college-athlete case law that *does* exist as of this writing—should so-called "revenue sport" college athletes be considered within the same "particular class of employees" as non-revenue-sport college athletes? *See* Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring) (distinguishing between revenue sports and non-revenue sports when considering "the economic reality and the sometimes frayed tradition of amateurism" as applied to FLSA determinations of employment status). For an attempt to answer these questions in the context of whether athletic scholarships are "regularly provided," see *infra* notes 252–261 and accompanying text.

2. Requirement 2: Benefits Must Be "Voluntary and Uncoerced"

As noted above and by a legal scholar discussing the early days of the FLSA, an early determination by the DOL in applying § 3(m) was to ensure that in-kind benefits provided to employees were "accepted by [the employee] voluntarily and not as a result of compulsion by [the] employer."[116] As such, in order for employers to be able to claim in-kind benefits provided to employees as creditable towards FLSA requirements, the benefit must be accepted by the employee "voluntarily and without coercion."[117]

Certain presumptions exist when interpreting this requirement, namely, the presumption discussed above in *Lopez* when an employee voluntarily accepts a position known to be of the "live-in" variety.[118] More broadly, the DOL has stated that it "will normally consider the lodging as voluntarily accepted by the employee when living at or near the site of the work is necessary to performing the job."[119]

Relying on this presumption, the court in *Roces* pointed to testimony by the plaintiffs stating that they "fully understood the Agreement prior to entering into it, and fully deliberated whether the arrangement would be beneficial to them prior to accepting it," while feeling free to decline the opportunity.[120] Accepting prior case law and DOL regulations stating that acceptance of a benefit is voluntary if an employee knows that a benefit is an integral part of the job ahead of taking the position, the court held in this case that living in "was a necessary part of the live-in position" and that there was no evidence of coercion either in signing the employment contracts nor in retaining the position for as long as they did.[121]

Other courts have also agreed with the DOL interpretation to this end, finding that when "'living-in' is an integral part of the job, the elements of voluntarism and coercion take on different meanings."[122] As discussed above, the D.C. Circuit in *Lopez* found that if employees understood that a position required "living-in" as an integral part of the job when they took the job, the acceptance of the position in general made the acceptance of the benefit "voluntary and uncoerced."[123] For example, babysitters taking jobs as live-in

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116 Wecht, *supra* note 76, at 244.

117 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

118 Lopez v. Rodriguez, 668 F.2d 1376, 1379–80 (D.C. Cir. 1981).

119 *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

120 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1187 (D. Nev. 2018).

121 *Id.* at 1185–87; *see also Lopez*, 668 F.2d at 1380 (noting that when "'living-in' is an integral part of the job, the elements of voluntarism and coercion take on different meanings").

122 *Lopez*, 668 F.2d at 1380.

123 *Id.*

caretakers, knowing from the outset that the position requires living with the charges under their care, accept the benefit of living in their employers' houses as "voluntary and uncoerced."[124] This essentially creates a two-element test for determining whether a benefit is received voluntarily and uncoerced: first, whether acceptance of the benefit is a necessary condition of employment, and second, whether the employee knew of this essential requirement ahead of time and voluntarily accepted the job anyway.

Complicating matters, however, is the fact that at least three courts have ruled the "voluntary and uncoerced" guideline to be entirely inconsistent with the statutory text of the FLSA in its totality. Just one year after it did not review a portion of a lower court's ruling that the failure to provide employees with a cash alternative meant that a benefit was involuntarily received,[125] the Eleventh Circuit in *Davis Brothers, Inc. v. Donovan*[126] reversed course, finding that no basis for the "voluntary and uncoerced" regulation existed within the text of the FLSA and § 3(m).[127] The Eleventh Circuit noted that the D.C. Circuit in *Lopez* had "avoided holding the voluntary and uncoerced standard illegal by narrowly interpreting it in the context of a job . . . that cannot be performed without the employee's partaking in the facility."[128] The Eleventh Circuit wrote that, while the "voluntary and uncoerced" requirement may be good policy, the DOL's arguments to this end were "directed to the wrong forum" as "Congress, not the judiciary, is empowered to determine this country's minimum wage policy."[129]

Citing this ruling, the Fifth Circuit adopted per curiam a Louisiana district court's holding that the Secretary of Labor's "employee choice" construction of 29 C.F.R. § 531.30 as "inconsistent with the plain language of [§] 3(m)."[130] More recently, the Sixth Circuit rejected the "voluntary and uncoerced" requirement altogether in the context of non-lodging benefits (specifically meals), holding that "[n]othing in § [3(m)] indicates that employers

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124 *Id.*

125 *See* Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 473 (11th Cir. 1982) (noting but declining to address a district court finding that the refusal by the employers "to provide their employees with an option to receive cash in lieu of the meals and lodging with respect to which appellants claimed a credit" meant that "the employees' acceptance of such meals and lodging was not 'voluntary and uncoerced'"); Marshall v. New Floridian Hotel, Inc., No. 77-civ-1028, 1979 U.S. Dist. LEXIS 10122, at *29 (S.D. Fla. Aug. 29, 1979) (holding that since the employers "failed to provide their employees with an option to receive in cash the amounts attributed and claimed as a credit by defendants for meals" and other benefits, the "employee's acceptance of such meals, lodging or other facilities is not voluntary and uncoerced and thus such may not be considered 'furnished' under [§] 3(m)"). For further discussion, see *infra* note 236.

126 700 F.2d 1368 (11th Cir. 1983).

127 *Id.* at 1370–71.

128 *Id.* at 1372.

129 *Id.*

130 Donovan v. Miller Props., 711 F.2d 49, 50 (5th Cir. 1983).

must give their employees a choice of whether to accept meals" and ruling that an employer's meal-credit plan was valid for the purposes of minimum wage credit "even though its employees ha[d] no choice but to accept the plan."[131]

Regardless of this disapproving precedent, the "voluntary and uncoerced" requirement still exists within the DOL guidelines and within its interpretive regulations.[132] This is shown in part by *Roces*, which stands as recent precedent showing that the "voluntary and uncoerced" requirement is at least still generally followed within the Ninth Circuit's footprint.[133] Indeed, district courts in other jurisdictions have been mixed on whether to follow the standing DOL guidelines or the Fifth, Sixth, and Eleventh Circuit precedent overturning them. The "voluntary and uncoerced" requirement has been recently and approvingly applied by district courts within the footprints of the First,[134] Eighth,[135] and Tenth[136] Circuits, and even twice by a district court in Florida despite the Eleventh Circuit's rejection of the requirement in *Davis Brothers, Inc.*[137] On the other hand, some other district courts have rejected employees' attempts to

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131 Herman v. Collis Foods, 176 F.3d 912, 918 (6th Cir. 1999).

132 *See* 29 C.F.R. § 531.30 (2020) ("Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced."); *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 7.

133 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1185–87 (D. Nev. 2018).

134 Montoya v. CRST Expedited, Inc., 404 F. Supp. 3d 364, 393 (D. Mass. 2019) (finding that wage deductions instituted by employers for employee training that exceeded what the employees anticipated being charged "call[s] into question both [the] reasonableness and voluntariness" of the benefits provided).

135 Reich v. Giaimo, No. 85-2184(c)(5), 1993 WL 724662, at *8 (E.D. Mo. Dec. 30, 1993) (finding that the child care services offered by an employer to employees was not "voluntary and uncoerced" because "[n]o evidence was offered at trial to establish that the employees either understood or agreed that child care was part of their wages").

136 Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1083 (D. Co. 2016) (acknowledging the alleged employer's argument that the acceptance of lodging by plaintiff *au pairs* was in fact "voluntary and uncoerced" but dismissing the argument as a "red herring[]" given the other issues with the alleged employer's defenses).

137 Chavez v. Arancedo, No. 17-cv-20003, 2018 U.S. Dist. LEXIS 162898, at *18 (S.D. Fla. Sept. 24, 2018) ("An employer is entitled to credit for the reasonable cost of furnishing certain non-cash items to the employee such as meals and lodging for the employee's benefit, *if the employee voluntarily accepts them*." (emphasis added)); Robles v. Acebo Roofing Corp., No. 16-cv-21817, 2017 U.S. Dist. LEXIS 33137 (S.D. Fla. Mar. 7, 2017) (finding the defendant-employer's actions in automatically deducting employer-provided lunches from the plaintiff-employees' paychecks to be violative of the FLSA, in part because the plaintiffs "were not given an option to take the lunches as part of their wages in lieu of monetary compensation"). Neither *Robles* nor *Chavez* cited *Davis Brothers Inc. v. Donovan*; notably, *Robles* instead discussed the Eleventh Circuit's prior decision in *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 473–74 (11th Cir. 1982), in defining the "voluntary and uncoerced" requirement to require an option to receive cash payment in lieu of the employer-provided meals.

enforce this requirement, with the Northern District of Illinois for example arguing that administrators have "abandoned this requirement after many federal courts found that the rule was not properly read into the statute."[138]

3. Requirement 3: Benefits Must Be "Furnished in Compliance with Applicable Federal, State, or Local Law"

In sharp difference to the "voluntary and uncoerced" requirement, the third requirement, that the benefits must be "furnished in compliance with applicable federal, state, or local law," is fairly straightforward: the requirement merely requires that the provisions be up to code with any applicable law.

Roces provides perhaps the best illustration of this requirement. In *Roces*, the plaintiffs argued that the lodging "did not comply with Nevada law, because 'lodging in lieu of wages is illegal' in Nevada."[139] However, the court noted that the examples of lodging being out of compliance per this requirement generally included "lodging that is substandard or not authorized for residential use, or for which necessary occupancy permits have not been obtained."[140] Holding that § 3(m) and the governing DOL regulations make clear that the purpose of this requirement "is merely to ensure that the lodging provided in lieu of wages meets minimum standards for safe, healthful, and lawful housing conditions pursuant to all applicable laws and ordinances," the court concluded that these requirements "require that the lodging itself comply with state law, not that lodging in general be a permissible form of compensation under state law."[141] If the plaintiffs were correct that the use of lodging for wage credit was violative of Nevada law, the proper remedy was through Nevada state wage-and-hour laws, not the FLSA.[142]

Similarly, other case law provides that violation of contractual requirements would not constitute a violation of "federal, state, or local law" for the purposes of satisfying this requirement. In *Ramos-Barrientos v. Bland*,[143] the

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138 D'Agostino v. #7 Zimmie's, Inc., 77 F. Supp. 3d 719, 727–28 (N.D. Ill. 2014) (citing *Herman v. Collis Foods, Inc.*, 176 F.3d 912 (6th Cir. 1999), favorably for the proposition that the DOL's regulation holding that "the cost of meals be deducted individually based on what each employee consumed was invalid because it effectively created a new requirement that the program be a 'voluntary and uncoerced' exercise," though it is unclear whether the court was referring to federal rule or Illinois rule); *see also* Archie v. Grand Cent. P'ship, 86 F. Supp. 2d 262, 267 n.2 (S.D.N.Y. 2000) ("Plaintiffs' interpretation of 29 C.F.R. § 531.30, that acceptance of benefits must be 'voluntary and uncoerced,' has, in any event, been struck down by three courts of appeals as being inconsistent with the statute.").

139 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1188 (D. Nev. 2018).

140 *Id.*

141 *Id.*

142 *Id.*

143 661 F.3d 587 (11th Cir. 2011).

employees—a group of H-2A visa holders working on a farm—argued that the employer's actions in crediting the cost of provided meals against their wages was illegal because the regulations governing their H-2A employment required employers "to promise in their work contracts to reimburse workers for inbound subsistence."[144] The court found that the failure of the employer to provide those reimbursements "would be a violation of a private contract, not a violation of federal law," since the regulations only forced employers to promise to provide such reimbursements in the hiring contracts.[145] As such, like in *Roces*, the remedy here would be through a breach of contract action, not through an FLSA claim.

The court in *Ramos-Barrientos* did make an interesting point, however, that may make this requirement applicable to college athletes in the future. While the court firmly stated that violations of individual contracts do not apply to this third requirement, § 3(m) *does* provide "for the protection of benefits secured by collective bargaining agreements."[146] The court did not expand on this point or cite any authority to support this claim, but the point makes sense as a violation of a collective bargaining agreement term would be violative of the NLRA as an unfair labor practice, rather than a simple breach of contract.[147] This point—while likely mere dicta—does provide an interesting hypothetical question as to how benefits would be handled should college athletes ever successfully unionize[148] and if the creditability of benefits is not explicitly spelled out in the resulting collective bargaining agreement.

4. Requirement 4: The Benefits Must Primarily Benefit the Employee, Rather Than the Employer

Contrary to the "voluntary and uncoerced" requirement—which as noted has been a subject of disagreement between the DOL and some courts—the one

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144 *Id.* at 599.

145 *Id.* Of interest to the facts in *Ramos-Barrientos* but not to the facts discussed in this Article, the court noted that this analysis may be different for newer employers since "[a] recently promulgated regulation subjects an employer of H-2A workers to civil penalties for failure to comply with work contracts." *Id.*; *see also* 29 C.F.R. § 501.19 (2020). However, the court found that this provision "applies only to employers who submitted applications to hire H-2A workers on or after March 15, 2010," which did not include the employers in the present case. *Ramos-Barrientos*, 661 F.3d at 599.

146 *Ramos-Barrientos*, 661 F.3d at 599.

147 *See generally* John L. Sullivan, Note, *Individual Actions for Breach of a Collective Bargaining Agreement: Judicial Alternatives to the Grievance Procedure*, 1978 WASH. U. L. Q. 765.

148 As Northwestern football players famously attempted to do in 2014. *See* Nw. Univ., 362 N.L.R.B. 1350 (2015) (declining jurisdiction over a unionization attempt by Northwestern University football college athletes); *see also supra* note 9 and accompanying text.

major restriction within the DOL regulations that is generally undisputed is this fourth requirement. As discussed above, this fourth requirement—that the in-kind benefit "must primarily benefit the employee, rather than the employer"—is perhaps the most vital of those promulgated by the DOL.[149] This condition ensures that benefits provided in lieu of compensation are, in fact, "benefits" and not just a way for employers to shift the normal costs of doing business onto the employees.[150]

Under the DOL interpretative regulations, "the cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages."[151] As examples of "facilities" that must be considered for the benefit of the employer, the DOL regulations point to a number of work-related equipment or costs, including explosives, miners' lamps, police and guard protection, chamber of commerce dues, and taxes and insurance on employer buildings that are not used for lodging.[152]

On the other hand, certain benefits have been found to be presumed to be for the benefit of the employee, rather than the employer. In *Soler v. G. & U., Inc.*,[153] the Second Circuit found that the "meaning and intent" of the statutory language of the FLSA was "clear" and that "Congress explicitly authorized a wage paid by an employer to an employee to include the reasonable cost of lodging, board, and other facilities which confer similar benefits on employees, and which are customarily furnished by the employer to his employees."[154] Supporting that reasoning, the Second Circuit wrote that housing and food "are essential for human existence and are ordinarily paid for from an employee's earnings," and if "an employer absorbs this expense for an employee, it is only equitable and reasonable that the employee 'reimburse' the employer from wages earned."[155]

In *Roces*, however, the court's analysis was a little more complicated than simply abiding by the presumption. Indeed, the court quoted *Soler* in noting that the presumption it articulated "may be rebutted 'by substantial evidence demonstrating that the housing is not a benefit running primarily to the employee,

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149 *See supra* notes 86–91 and accompanying text.

150 *See, e.g.*, *Ramos-Barrientos*, 661 F.3d at 594–95 (noting that the FLSA wage requirements are crafted to "prohibit[] any arrangement that 'tend[s] to shift part of the employer's business expense to the employees . . . to the extent that it reduce[s] an employee's wage below the statutory minimum'" (alterations in original) (quoting Mayhue's Super Liquor Stores v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972))).

151 29 C.F.R. § 531.32(c) (2020).

152 *Id.*

153 833 F.2d 1104 (2d Cir. 1987).

154 *Id.* at 1108.

155 *Id.*

but rather a burden imposed upon the employee in furtherance of the employer's business.'"[156] For example, in *Masters v. Maryland Management Co*.,[157] the Fourth Circuit held that an apartment complex that had furnished a unit to an engineer working at the complex could not credit that apartment complex towards the engineer's wages.[158] Here, the presumption was rebutted because the apartment complex required the engineer to live on the facilities and be on-call and close by for 24 hours per day during his five day workweek, should any issues arise on the complex premises.[159] Similarly, in the earlier discussed *Ramos-Barrientos*, the Eleventh Circuit found that the employer was not entitled to deduct housing costs from its farmworker employee wages because it was required to provide housing to the employees for free under the terms of their H-2A visas.[160] As such, the provision of housing was deemed a "mandatory business expense" that could not be creditable under the plain language of § 3(m), as the employees were already entitled to receive that benefit for free.[161]

Given the specific facts in *Roces*, however, the court noted that while the presence of the plaintiffs on site certainly benefited the employer, this requirement "was not an incidental condition of their desired employment" but instead "the main attraction in accepting to do the related work."[162] Distinguishing the facts from prior cases that had determined that the employees did not primarily benefit from free lodging, the court found that while the on-call requirements imposed on the plaintiff were burdensome, they did not require the plaintiffs to be on site at all times.[163] Additionally, the plaintiffs "were free to use and enjoy their apartments to the same extent as any other paying tenant" and "were also free to come and go at all hours of the day," so long as they completed their tasks during business hours.[164] By contrast to the plaintiffs' arguments that the housing "was 'of little benefit' to them," the court found that "the significant

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156 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1189 (D. Nev. 2018) (quoting *Soler*, 833 F.2d at 1110).

157 493 F.2d 1329 (4th Cir. 1974).

158 *Id.* at 1331–34.

159 *Id.*

160 Ramos-Barrientos v. Bland, 661 F.3d 587, 596–98 (11th Cir. 2011).

161 *Id.*

162 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1189–90 (D. Nev. 2018).

163 *Id.* at 1190; *see also* Marshall v. De Bord, No. 77-106-C, 1978 U.S. Dist. LEXIS 16339, at *15–16 (E.D. Okla. July 27, 1978) (finding that the lodging in question was "primarily furnished for the benefit of the defendant-employer since the employees were required to live at the premises and since at least one employee had to be available at all times"); Bailey v. Pilots' Ass'n for Bay & River Del., 406 F. Supp. 1302, 1309 (E.D. Pa. 1976) (finding that lodging provided by the employer was provided primarily for the benefit of the employer because the employee "was required to be on duty for seven days at a time").

164 *Roces*, 300 F. Supp. 3d at 1190.

majority of their time was available to them to use and enjoy their homes as they saw fit," meaning that they derived significant benefit from the housing even despite the benefit gained from the employer from having them live on site.[165] Therefore, the court found the requirement met.[166]

This presumption is even harder to overcome when it comes to meals. In fact, the DOL regulations make clear that the presumption that meals be considered for the benefit of the employee rather than the employer is less of a presumption and more of a mandate. Rather than framing it as a rebuttal presumption, the regulatory interpretive language governing the DOL's application of the FLSA states that in contrast to other benefits, "meals are always regarded as primarily for the benefit and convenience of the employee."[167]

For other facilities outside of housing and meals, however, application of the primary benefit test becomes complicated. One attempt to define the boundaries of this balancing test came from the Eleventh Circuit in *Arriaga v. Florida Pacific Farms, L.L.C.*[168] In *Arriaga*, the court noted that the examples provided in the regulatory definitions of "other facilities" draw "a consistent line . . . between those costs arising from the employment itself and those that would arise in the course of ordinary life" in determining whether farmworkers' transportation, travel, visa, and recruitment costs were creditable towards the workers' first paycheck.[169] As discussed earlier, the Eleventh Circuit drew a comparison between employer-issued uniforms and the furnishing of clothing in general, where the employer-issued uniforms would clearly be primarily for the benefit of the employer while the issuance of street clothes would be for the benefit of the employee, even if the employer did benefit in some way by having its employees conform to some uniform dress. Per the *Arriaga* court, so long as "the employer 'merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress[,] the garments chosen would not be considered uniforms'" under § 3(m).[170]

However, the Eleventh Circuit included a footnote noting that "[i]n many cases involving the FLSA, courts found that a certain item, which was obviously not directly connected to the performance of the employee's principal

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165 *Id.* at 1191.

166 *Id.*

167 29 C.F.R. § 531.32(c) (2020); *see also, e.g.*, Herman v. Collis Foods, 176 F.3d 912 (6th Cir. 1999).

168 305 F.3d 1228 (11th Cir. 2002).

169 *Id.* at 1242.

170 *Id.* (alteration in original) (quoting Ayres v. 127 Rest. Corp., 12 F. Supp. 2d 305, 310 (S.D.N.Y. 1998)).

activity, was nevertheless primarily for the benefit of the employer."[171] For example, in *Brennan v. Modern Chevrolet*,[172] a court found that an automobile furnished by an auto dealership to a salesman was primarily for the benefit of the employer, rather than the employee, even though approximately 90% of the mileage put on the vehicles by the salesman was related to personal use.[173] In this case, the court noted that "[t]he very nature of [the salesman's] duties as a car salesman would require his possession and use of an automobile, even on personal business, and that the business of his employer would suffer if this were not the case."[174]

The *Brennan* case illustrates that the presumption that lodging and meals are primarily for the benefit of the employee may not exist for other in-kind benefits. Indeed, *Brennan* found that a car furnished by a dealership to a salesman was for the primary benefit of the employer, even though the vast majority of the miles put on the car were for personal use.[175] Put more directly, a district court in Illinois wrote in a footnote in a similar case that vehicles furnished to employees cannot be creditable if "the vehicles provided were also used by [the employee] to advance [the employer's] business interests."[176] This language shows that, in opposition to the presumption granted to employers for housing and meals, if the grant of an in-kind benefit serves to advance the interests the employer to any degree, that benefit cannot be credited towards wages under § 3(m).

5. Requirement 5: The Employer Must "Maintain Accurate Records of the Cost Incurred" in Furnishing the Benefit

The final requirement, that the employer must "maintain accurate records of the cost incurred" in furnishing the benefit, is, generally speaking, the easiest requirement for employers to satisfy. Indeed in *Roces*, for example, even while the defendants conceded that they failed to maintain weekly payroll records for the plaintiffs[177] in accordance with this requirement, the court noted

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171 *Id.* at 1241 n.16.

172 363 F. Supp. 327 (N.D. Tex. 1973), *aff'd mem.*, 491 F.2d 1271 (5th Cir. 1974).

173 *Id.* at 333.

174 *Id.*; *see also* Marshall v. Sam Dell's Dodge Corp., 451 F. Supp. 294, 304 (N.D.N.Y. 1978) ("[I]t is plain that these 'demos' were furnished primarily for the benefit of defendants. Clearly, the cars were valuable and necessary tools.").

175 *Brennan*, 363 F. Supp. at 333.

176 Uphoff v. Elegant Bath, No. 96-C-4645, 1997 U.S. Dist. LEXIS 7449, at *8 n.3 (N.D. Ill. May 15, 1997), *rev'd on other grounds*, 176 F.3d 399 (7th Cir. 1999).

177 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1192 (D. Nev. 2018). The employer stated that it did not keep records because it did not view the plaintiffs as employees. *Id.* The employment issue was seemingly not litigated—the court included no discussion of whether the

that this admission would not be fatal to their claim to wage credit for the provided lodging.[178] Pointing to several cases cited by the plaintiffs where courts had disallowed housing credit for a failure to maintain records, the court noted that in each of these cases the employers had both "failed to keep records *and* failed to present other credible evidence substantiating their estimates of reasonable cost."[179] As the employer was able to offer "much more than 'unsubstantiated estimates' as evidence of its reasonable costs," they were found to have met this last requirement.[180]

In other cases, however, determining "reasonable cost" of provided benefits can get difficult, especially in cases involving housing benefits. In *Chavez v. Arancedo*,[181] the court rejected the defendant employer's offering of expert affidavits by a local broker "that estimated the value of Defendant's home and the rental value of Plaintiff's room" that the plaintiff received within the defendant's home as part of her compensation as a live-in maid for the defendant.[182] The court's reasoning in rejecting this estimate was based on prior Eleventh Circuit precedent holding that "the 'retail value' of a property is insufficient evidence in determining the 'reasonable cost' or 'fair value' of a lodging credit" as the value of the property was not the determining factor, but instead the value of the credit must be based on "the cost to the employer for providing the lodging"—which would obviously allow the employer to deduct significantly less from the employee's paycheck.[183]

Furthermore, the court found that providing estimates of retail value does not absolve the employer of the need to "maintain and preserve

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plaintiffs were employees in the cited summary judgment ruling and the employer did not raise the issue in its motion for summary judgment (no motion to dismiss was filed)—so it can only be presumed that the defendant conceded employment after the lawsuit was filed. However, the court (and employer) may have simply been arguing that they did not see the plaintiffs as employees while they were *on call*; the defendants did raise an argument in their motion for summary judgment that the plaintiffs were "waiting to be engaged" while they were on call and thus not employed during that time, which the court agreed with as a matter of law. *See id.* at 1193–97; *see also* Points and Authorities in Support of Defendant's Rule 56, FRCP Motion for Summary Judgment at 11–21, Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172 (D. Nev. 2018) (No. 3:15-cv-00408).

178 *Roces*, 300 F. Supp. 3d at 1192.

179 *Id.* at 1192–93 (emphasis in original).

180 *Id.* at 1193.

181 No. 17-cv-20003, 2018 U.S. Dist. LEXIS 162898 (S.D. Fla. Sept. 24, 2018).

182 *Id.* at *21–22.

183 *Id.*; *see also* Washington v. Miller, 721 F.2d 797, 803 (11th Cir. 1983). This finding conformed with DOL regulations, which define that "reasonable cost" under § 3(m) to be "not more than the actual cost to the employer of the board, lodging, or other facilities," 29 C.F.R. § 531.3(a) (2020), and to "not include a profit to the employer or to any affiliated person, 29 C.F.R. § 531.3(b). *See* Montoya v. CRST Expedited, Inc., 404 F. Supp. 3d 364, 309 (D. Mass. 2019).

contemporaneous records substantiating the cost of furnishing lodging as well as other comprehensive records 'showing additions or deduction from wages paid for boarding, lodging, or other facilities on a work week basis.'"[184] This baseline requirement is shown in other cases, including in *Balbed v. Eden Park Guest House, L.L.C.*,[185] where the Fourth Circuit refused to grant the employers the right to credit housing benefits due to their failure to meet this requirement, as, even though the parties agreed on the value of the accommodations, the defendant employer still had to comply with other requirements, including keeping records.[186] Similarly, in *Yu G. Ke v. Saigon Grill*,[187] the employer was not even allowed to credit meals—a credit that is generally allowed by law—because it "proffered no records reflecting the cost of feeding the plaintiffs" and failed to "even offer[] any alternative evidence of such an out-of-pocket cost."[188]

IV. APPLYING THE FIVE REQUIREMENTS TO COLLEGE-ATHLETE IN-KIND BENEFITS

Due to recent litigation and the creative way that the NCAA has responded by shifting the definition of the term "amateur" over time, the college-athlete "employment" package has become quite valuable when looking at the summation of the base costs of each provided benefit.[189] But as this Article has sought to make clear, just because a benefit is economically "valuable" does not mean that it is a valid substitute for minimum wage and overtime under federal wage-and-hour law. As such, this Part looks to analyze each of the three primary benefits afforded to college athletes under the standard Division I college-athlete "employment" package—(1) housing; (2) meals; and (3) athletic scholarships—to determine whether they fit the five requirements of a creditable in-kind benefit under § 3(m). This section will also look more generally at the other benefits provided to college athletes to determine whether they fit the requirements as well.

A. Housing

According to the NCAA Division I manual, institutions are allowed to "provide a student-athlete financial aid that includes the cost of room and board, based on the official allowance for a room as listed in the institution's official publication (e.g., catalog)" as part of the benefits packages given to these

184 *Chavez*, 2018 U.S. Dist. LEXIS 162898, at *22–23.

185 881 F.3d 285 (4th Cir. 2018).

186 *Id.* at 289–90.

187 595 F. Supp. 2d 240 (S.D.N.Y. 2008).

188 *Id.* at 256–57.

189 *See supra* notes 64–69 and accompanying text.

athletes.[190] This "financial aid" can be provided in one of several ways: through the provision of a "facility designated by the institution" (commonly in on-campus housing),[191] a cost-free apartment,[192] or a stipend "equal to the institution's official on-campus room allowance as listed in its catalog, the average of the room costs of all of its students living on campus, or the room cost as calculated based on its policies and procedures for calculating the cost of attendance for all students."[193]

Applying this benefit to the five § 3(m) requirements, one can find this benefit meets the first DOL requirement quite easily, given the value of college-athlete living environments as a recruiting tool.[194] The "arms race" involved in college-athlete recruiting has become something of a cliché when discussing the benefits given to intercollegiate athletes, as competitive Division I schools creatively try to offer the best benefit package they possibly can to their recruits without running afoul of NCAA restrictions (and often running afoul of those restrictions anyway).[195] Specific to housing, while NCAA rules forbid schools from housing residence halls with more than 49% college athletes, many schools

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190 NCAA, *supra* note 51, § 15.2.2.

191 *Id.* § 15.2.2.2.

192 *Id.* § 15.2.2.1.4. The provision of a cost-free apartment is only allowable so long as the apartment is valued at "an amount equal to the institution's official room allowance" and "is not rented by the institution at a reduced rate." *Id.* If the apartment is worth more than the institution's official room allowance, college athletes are responsible for paying the difference out of their own pockets. *Id.*

193 *Id.* § 15.2.2.1.

194 *See id.*

195 *See* Agnew v. NCAA, 683 F.3d 328, 347 (7th Cir. 2012) (noting the "veritable arms races" that schools compete in "to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes"); GILBERT M. GAUL, BILLION-DOLLAR BALL (2015); Adam Hoffer, Brad R. Humphreys, Donald J. Lacombe & Jane E. Ruseski, *Trends in NCAA Athletic Spending: Arms Race or Rising Tide?*, 16 J. SPORTS ECON. 576 (2015); Rustin Dodd, *Upscale Athlete Housing Is the Next Weapon in College Sports' Arms Race*, KAN. CITY STAR (Jan. 18, 2014, 8:23 PM), https://www.kansascity.com/sports/college/big-12/university-of-kansas/article336824.html; Javier Morales, *The College Sports Arms Race Is Only Getting More Extravagant*, COLL. AD (Mar. 15, 2016), https://collegead.com/the-college-sports-arms-race-is-only-getting-more-extravagant-nutrition-centers-indoor-practice/. The benefits provided to college athletes have become rather creative in recent years; for instance, Clemson University made headlines for installing a playground slide in its football facilities and the University of Central Florida drew criticism for its plans to build a lazy river outside its football stadium in order to attract recruits and big-money donors. Alex Kirshner, *Yup, Clemson's Putting a Playground Slide in the Middle of Its Football Facility*, SB NATION (Dec. 19, 2016, 2:16 PM), https://www.sbnation.com/college-football/2016/12/13/13945552/clemson-facility-slide-photos-video; Annie Martin, *UCF's Lazy River: Perk for Athletes and Fans, or "Unadulterated Waste" of Money?*, ORLANDO SENTINEL (Oct. 3, 2019, 5:30 AM), https://www.orlandosentinel.com/news/education/os-ne-ucf-lazy-river-20191003-fwnqk36lnzaz5drlofoabd4cay-story.html; *see also infra* note 205 (discussing schools who have built expensive food facilities and student housing for college-athlete recruiting).

have built expensive dormitories that are specifically near athletic facilities that are prescribed as housing exactly 49% college athletes.[196] These housing facilities are regularly provided as a portion of the compensation schools are currently allowed under NCAA rules to provide to college athletes, and competitive Division I institutions regularly take full advantage of this benefit to ensure that the best college athletes want to join their athletic departments.[197] Since, as *Roces* demonstrated, this requirement that the benefits must be "customarily furnished" only applies to like employees, a college-athlete plaintiff would not be able to argue, for example, that the requirement is not met because universities do not customarily furnish housing to other university employees, including faculty, administrators, and graduate assistants.[198] Thus, in regards to housing, the first requirement, that the benefit be "regularly provided" to all like employees, is almost certainly satisfied.

When applying the second, "voluntary and uncoerced" requirement to the housing benefits received by college athletes, however, the calculus becomes somewhat more complicated. Here, it is helpful to refer back to the D.C. Circuit's holding in *Lopez*, and the two-element test that can be derived from that ruling: first, whether the benefit is a necessary condition of employment; and second, whether the employee knew of this essential requirement ahead of time and voluntarily accepted the job anyway.[199]

Both elements here are easily disposed of, however, as no reasonable argument can be made that living on campus "is necessary to performing the job" of playing intercollegiate sports.[200] Unlike the *Roces* plaintiffs, who were required to live on-site "to ensure management knows what is happening on the property after hours, to deal with emergency situations that arise after hours, and to maintain a presence on-site that will help tenants feel more comfortable after

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[196] *See* Lisa Horne, *Oklahoma's New $75 Million Headington Hall Will Lure Football Recruits*, BLEACHER REP. (July 31, 2013), https://bleacherreport.com/articles/1723178-oklahomas-new-75-million-headington-hall-will-lure-football-recruits; Brett Mixon, *New South Donahue Residence Hall More Than a Pretty Building*, BLEACHER REP. (Mar. 24, 2013), https://bleacherreport.com/articles/1579830-auburn-football-new-south-donahue-residence-hall-more-than-a-pretty-building; *NC State Plans New $15 Million Dorm for Student-Athletes*, ABC 11 EYEWITNESS NEWS (Sept. 14, 2015), https://abc11.com/education/nc-state-plans-new-$15-million-dorm-for-student-athletes-/984365/; Kyle Rowland, *Where Everything Is an Arms Race, College Athlete Housing Has Entered the Recruiting Discussion*, ELEVEN WARRIORS (June 18, 2014, 1:00 PM), https://www.elevenwarriors.com/college-basketball-recruiting/2014/06/36633/where-everything-is-an-arms-race-college-athlete-housing-has-entered-the.

[197] *See* sources cited *supra* note 195.

[198] Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1185 (D. Nev. 2018); *see also supra* notes 107–109 and accompanying text.

[199] Lopez v. Rodriguez, 668 F.2d 1376, 1380 (D.C. Cir. 1981); *see also supra* notes 122–124 and accompanying text.

[200] *See id.* at 1187.

hours,"[201] college athletes obviously have no on-site maintenance or management expectations. Indeed, NCAA regulations allow member institutions to provide college athletes an off-campus stipend in lieu of merely providing housing, suggesting that living on campus is certainly not a job requirement for college athletes.[202]

The NCAA's allowance of an off-campus stipend instead of mandatory housing does suggest that schools can meet the "voluntary and uncoerced" requirement for housing benefits, and thus receive credit for that benefit towards minimum wage payments. However, this may not be true for what would be considered the college athletes' direct employers: the universities themselves. Some schools do require college athletes to live on campus for at least their first year, either through college-athlete specific policies or through general student housing policies.[203]

For these schools, the split existing between the DOL regulations and the holdings of the Fifth, Sixth, and Eleventh Circuits—which found the "voluntary and uncoerced" guideline to be unsupported by the statutory text of the FLSA[204]—becomes particularly relevant. For that first year—or as long as

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[201] *Id.*

[202] NCAA, *supra* note 51, § 15.2.2.1 (allowing institutions to provide a room and board stipend "equal to the institution's official on-campus room allowance as listed in its catalog, the average of the room costs of all of its students living on campus or the cost of room as calculated based on its policies and procedures for calculating the cost of attendance for all students").

[203] *See FAQ for Incoming Student-Athletes*, PENN ATHLETICS, https://pennathletics.com/sports/2019/8/12/faq-for-incoming-student-athletes.aspx (last visited Sept. 7, 2020) ("All first-year, transfer, and exchange students will be required to live on campus and participate in a meal plan during their first year of enrollment."); *Financial Aid*, UNIV. OF NOTRE DAME ATHLETICS COMPLIANCE OFF., https://ncaacompliance.nd.edu/financial-aid/ (last visited Sept. 7, 2020) ("Please be aware that any student-athlete receiving athletics aid MUST live on-campus for six academic year terms (fall/spring) and any summer terms leading up to his/her sixth term."); *Housing for First-Year Students*, SYRACUSE UNIV., https://www.syracuse.edu/life/housing/first-year/ (last visited Sept. 7, 2020) ("Syracuse University requires incoming students to reside on campus during their first two years of enrollment."); *Incoming Student-Athlete Frequently Asked Questions*, BYU ATHLETICS (July 2017), https://byucougars.com/dl/sites/default/files/2017—08/Incoming%20Student%20Athlete%20FAQ.pdf ("All incoming student-athletes who are graduating from high school the summer before they arrive and who are receiving a full or partial athletic scholarship are required by Athletic Department policy to live in on-campus housing."); *see also* Douglas Oliver, *Colleges Should Stop Forcing Students To Live On-Campus*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Jan. 28, 2019), https://www.jamesgmartin.center/2019/01/colleges-should-stop-forcing-students-to-live-on-campus/ (outlining some sample school housing policies requiring freshman to live on-campus with a few exceptions).

[204] *See* Herman v. Collis Foods, 176 F.3d 912, 918 (6th Cir. 1999); Davis Brothers, Inc. v. Donovan, 700 F.2d 1368, 1370–71 (11th Cir. 1983); Donovan v. Miller Props., 711 F.2d 49, 50 (5th Cir. 1983); *see also supra* notes 125–138 and accompanying text.

college athletes are, in fact, required to live on campus—the DOL would presumably disallow schools from crediting this benefit towards minimum wage. Schools within the jurisdictions of the Fifth, Sixth, and Eleventh Circuits, however, would be able to credit this benefit regardless of how voluntary the acceptance of the benefit actually was.

Like the first requirement, the third requirement, that the benefits "must be furnished in compliance with applicable federal, state, or local laws," can clearly be said to be met; to the Author's knowledge, no campus dormitories furnished to college athletes have been found to violate federal, state, or local laws.[205] Since, as demonstrated in *Roces,* the purpose of this requirement "is merely to ensure that the lodging provided in lieu of wages meets minimum standards for safe, healthful, and lawful housing conditions pursuant to all applicable laws and ordinances," this regulation would almost certainly not be at issue because all of the evidence about the quality of the housing and other benefits granted by universities to college athletes shows that these benefits are certainly "safe, healthful, and lawful."[206]

As for the fourth requirement, that the benefit must be furnished primarily for the benefit of the employee, rather than the employer, as noted above, when discussing the landmark discussion of this requirement in *Soler*, there exists something of a presumption here just as with the "voluntary and uncoerced" requirement. As discussed above, in *Soler*, the Second Circuit held that if an employer absorbs expenses like housing (and food) that "are essential for human existence and are ordinarily paid for from an employee's earnings" then "it is only equitable and reasonable that the employee 'reimburse' the employer from wages earned" if the employer pays for those essential needs.[207] However—and as *Roces* noted—*Soler* also held that this presumption "may be rebutted 'by substantial evidence demonstrating that the housing is not a benefit running primarily to the employee, but rather a burden imposed upon the employee in furtherance of the employer's business.'"[208]

For college athletes, this presumption could conceivably be rebutted in a situation where, for example, a football program required its players to live in on-campus dormitories close to the practice fields in order to better accommodate

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[205] Indeed, if schools' housing and food facilities did violate federal, state, and/or local law it would likely be a major recruiting disadvantage, making it a very unlikely occurrence. *See* Agnew v. NCAA, 683 F.3d 328, 346–47 (7th Cir. 2012) (noting that even though schools cannot engage in direct price competition, since NCAA bylaws prevent them from doing so, schools still "do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash" as, for example, schools "engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes").

[206] Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1188 (D. Nev. 2018).

[207] Soler v. G. & U., Inc., 833 F.2d 1104, 1108 (2d Cir. 1987).

[208] *Roces*, 300 F. Supp. 3d at 1189 (quoting *Soler*, 833 F.2d at 1110).

frequent practices. But even in this extreme hypothetical situation, it seems unlikely that a court would find that benefit to the football program to be strong enough to overturn the monumental presumed benefit for the college athletes. After all, the cases where this presumption was debated—including the housing offered to farm workers on the farm sites in *Soler*[209] and the on-site apartment offered to the apartment workers in *Roces*[210]—involved situations where the nature of the position was much more of a live-in nature than in the case of college athletes. And in both of these cases the courts declined to rebut the presumption, finding in *Soler* that since "workers were not required to live on the farms as a condition of employment" (and off-site housing was available) the on-site housing was for their benefit and in *Roces* that the free housing was a principal attraction of the job, the housing was found to be primarily for the workers' benefit.[211] By contrast, the only cases where the presumption was rebutted were in situations where the worker was on-call for nearly all hours of every day[212] or where providing free housing was required under federal law.[213] As college athletes—like the farmworkers in *Soler*—are generally given the opportunity to receive a stipend to live off-campus instead of in on-campus dorms and are certainly not required to be on-call at all hours of the day,[214] they almost certainly would not be able to rebut this presumption under relevant case law.

Finally, the fifth requirement, that "[t]he employer must maintain accurate records of the costs incurred in the furnishing of the [in-kind benefits],"

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209 *See Soler*, 833 F.2d at 1106.

210 *Roces*, 300 F. Supp. 3d at 1189.

211 *Id.*

212 *See, e.g.*, Marshall v. De Bord, No. 77-106-C, 1978 U.S. Dist. LEXIS 16339, at *15–16 (E.D. Okla. July 27, 1978) (finding that the lodging in question was "primarily furnished for the benefit of the defendant employer since the employees were required to live at the premises and since at least one employee had to be available at all times"); Bailey v. Pilots' Ass'n for Bay & River Del., 406 F. Supp. 1302, 1309 (E.D. Pa. 1976) (finding that lodging provided by the employer was provided primarily for the benefit of the employer because the employee "was required to be on duty for seven days at a time"). *But see Roces*, 300 F. Supp. 3d at 1189 (holding that the plaintiffs had not submitted enough evidence to rebut the presumption in favor of finding housing to be for the benefit of the employee even though there was "no dispute" that the employers required the plaintiffs "to live on-site and to be on call to respond to emergencies during a significant number of hours every day").

213 Ramos-Barrientos v. Bland, 661 F.3d 587, 596–98 (11th Cir. 2011) (holding that the employer could not deduct housing costs from employee wages because they were required to provide housing to the employees for free under the terms of their employer-sponsored H-2A visas); *see also supra* notes 160–161 and accompanying text.

214 NCAA rules restricting the number of practice and training hours per week certainly reinforce this assumption. *See* NCAA, *supra* note 51, § 17.1.7.1 ("A student-athlete's participation in countable athletically related activities . . . shall be limited to a maximum of four hours per day and 20 hours per week.").

is at this point irrelevant since the institutions are not attempting to claim these benefits as credit towards FLSA requirements. Additionally, as noted in *Roces* the failure to keep such records "is not an absolute bar" to receiving a credit.[215] If the colleges and universities someday do attempt to claim this credit they will need to keep accurate records, but as of now it is not necessary.[216] If and when they do, given *Roces*'s statement that the employers must only offer more than "unsubstantiated estimates" of the cost of what they are providing, schools would likely need only to show what other students pay for items like dorm room housing, meal plans, and college tuition in order to show the reasonable costs of the benefits provided to college athletes and meet this requirement.[217] Since the NCAA requires such accounting in order to show compliance with the rule disallowing the proffering of apartments greater than the value of the average on-campus dormitory,[218] institutions would almost certainly have no problem providing the same figures to a hypothetical court.

In conclusion, housing is a benefit that is regularly provided to college athletes; generally accepted voluntarily by the college athletes (with the exception of when college athletes are required to live on campus for at least their first year of college); presumably conforms to all applicable federal, state, and local laws; is furnished primarily for the benefit of the college athlete; and has its cost regularly accounted for by the employer college or university. Therefore, if college athletes are deemed employees, colleges and universities would likely be able to credit the facilitation of housing to these college athletes towards their required pay under FLSA provisions for the payment of minimum wage and overtime.

B. Meals

The furnishing of meals by colleges and universities has been something of a sore subject in the past for college athletes. In 2014, then–University of Connecticut ("UConn") star basketball player Shabazz Napier told reporters after UConn's victory in the NCAA National Championship that he sometimes goes

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215 *Roces*, 300 F. Supp. 3d at 1192.

216 The necessity in keeping ongoing records is especially irrelevant given the *Roces* court's deference to the employer's belief that the plaintiffs were not employees. *See supra* note 177. Similar deference will be given to the schools, given that as of this writing it is still not a certainty that college athletes will, in fact, be deemed employees under the FLSA.

217 *Roces*, 300 F. Supp. 3d at 1193.

218 NCAA, *supra* note 51, § 15.2.2.1.4; *see also supra* note 192 and accompanying text.

to bed "starving" because he could not afford food.[219] At the time, NCAA regulations only allowed for colleges and universities to provide three meals per day.[220] They also heavily restricted how much food players would be able to receive at certain events, as evinced by the February 2014 self-reported violations by the University of Oklahoma after three football players were found to have eaten too much pasta at a graduation banquet.[221]

In response to the criticism surrounding these and other events, the NCAA in March 2014 announced the removal of meal and snack restrictions on Division I college athletes (including walk-on athletes), effectively allowing college athletes to receive unlimited meals and snacks from their universities.[222] Since that announcement, schools have gone all out to provide the best and most easily accessible meals and snacks to their college athletes, spending millions of dollars more in food costs since the rule change.[223] According to one survey of NCAA financial reports from public schools, the 20 public schools spending the most money combined to spend over $40 million on meals per year.[224]

As company-provided meals are—like housing—a frequently-credited item for employers, a substantial amount of case law exists defining when meals can be credited towards FLSA wage requirements.[225] This case law establishes a constant theme: meals are generally the easiest benefit for employers to credit,

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[219] Sara Ganim, *UConn Guard on Unions: I Go to Bed "Starving"*, CNN (Apr. 8, 2014, 1:26 PM), https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html.

[220] Tyler Conway, *NCAA Approves Unlimited Meals and Snacks for Division I Student-Athletes*, BLEACHER REP. (Apr. 15, 2014), https://bleacherreport.com/articles/2030620-ncaa-approves-unlimited-meals-and-snacks-for-division-i-student-athletes.

[221] Jake Trotter, *Sooners Self-Report Excessive Pasta*, ESPN (Feb. 19, 2014), https://www.espn.com/college-football/story/_/id/10484741/oklahoma-sooners-penalized-three-student-athletes-eating-too-much-pasta. The football players were forced to donate $3.83 (the cost of the pasta serving) each to charity in order to have their eligibility reinstated. *Id.* The NCAA later stated that the players were not in violation of any NCAA rules and that the penalties were unnecessary and solely determined by the school. *Id.*

[222] Conway, *supra* note 220.

[223] Paul Myerberg, *NCAA Schools Put Money Where Athletes' Mouths Are*, USA TODAY (Apr. 26, 2015, 4:54 PM), https://www.usatoday.com/story/sports/college/2015/04/26/unlimited-food-snacks-wisconsin-oregon-ncaa-student-athletes/26405105/; Derek Saul, *6,800 Gallons of Milk and 2,120 Pounds of Beef Jerky: Behind D1 College Athlete Diets and Spending*, FORBES (July 9, 2019, 3:08 PM), https://www.forbes.com/sites/dereksaul/2019/07/09/6800-gallons-of-milk-and-2120-pounds-of-beef-jerky-behind-d1-college-athlete-diets-and-spending/.

[224] Brett Regan, *These 20 Colleges Spent $40 Million Just To Feed Student-Athletes*, FANBUZZ (July 10, 2019, 12:12 PM), https://fanbuzz.com/college-football/ncaa-student-athlete-dining/; *see also* Myerberg, *supra* note 223; Saul, *supra* note 223.

[225] *See, e.g.*, Herman v. Collis Foods, 176 F.3d 912 (6th Cir. 1999); Donovan v. New Floridian Hotel, Inc., 676 F.2d 468 (11th Cir. 1982); Yu G. Ke v. Saigon Grill, 595 F. Supp. 2d 240 (S.D.N.Y. 2008).

and it is rare for a plaintiff to overcome a general presumption that employer-provided meals can be credited towards minimum wage and overtime under the FLSA.

For this reason, most of the requirements when applied to college athletes are easily met. For the first requirement, for example, it would be easy to show that meals are customarily provided to college athletes, especially under the new rule providing unlimited meals and snacks for both scholarship and non-scholarship athletes at Division I schools. Those meals are a common and expected benefit of participation in Division I sports, and thus easily satisfy that first requirement.

Meals will also easily satisfy the third requirement since—as with housing—the providing of food that is not up to federal, state, or local code would certainly be a threat to the schools' ability to recruit top athletes. Indeed, just as with housing, all evidence is quite the opposite; college athletes are getting the best food available, no matter the cost.[226]

For the fourth requirement, that the benefit must be furnished primarily for the benefit of the employee, rather than the employer, just like with housing, there exists a presumption that meals are primarily for the benefit of the employee, rather than the employer.[227] But while for housing that presumption can be rebutted with "substantial evidence demonstrating that the housing is not a benefit running primarily to the employee, but rather a burden imposed upon the employee in furtherance of the employer's business,"[228] as discussed earlier under DOL guidelines the presumption for meals is almost impossible to rebut.[229] Indeed, per DOL regulations, "meals are always regarded as primarily for the benefit and convenience of the employee," meaning that this requirement would be easily met as a matter of law.[230]

The fifth requirement is also easily satisfied for meal plans, just as it was with housing. To show evidence of "accurate records of the cost incurred" in furnishing the benefits schools can simply use the cost of a standard student meal plan to show the value of the benefit provided to college athletes. Unlike in *Yu G. Ke* where the employer was not allowed to credit meals because it "proffered no records reflecting the cost of feeding the plaintiffs" and failed to "even offer[] any alternative evidence of such an out-of-pocket cost," schools have a variety of different options to show the cost of providing meals.[231] Indeed, even the

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226 *See, e.g.*, Myerberg, *supra* note 223.

227 *See* Soler v. G. & U., 833 F.2d 1104, 1108 (2d Cir. 1987); *see supra* notes 153–155 and accompanying text.

228 Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1189 (D. Nev. 2018) (quoting *Soler*, 833 F.2d at 1110).

229 *See supra* note 167 and accompanying text.

230 29 C.F.R. § 531.32(c) (2020).

231 *Yu G. Ke*, 595 F. Supp. 2d at 257.

numbers used in the above-cited survey of NCAA financial reports from public schools showing that the 20 public schools spending the most money combined to spend over $40 million on meals per year would likely be sufficient for each of those schools to provide an estimate of the costs to provide the benefit.[232]

The one potentially problematic requirement here for schools would be the second requirement: that the benefit be "voluntary and uncoerced." Like housing, where schools are free to give an off-campus housing stipend to college athletes that is only restricted based on the amount that can be provided, schools can provide a cash alternative to meals "as a benefit incidental to participation in intercollegiate athletics" under Bylaw § 16.5.2.4 of the NCAA regulations.[233] But unlike housing, this cash alternative is heavily restricted based on time and place.[234] For example, while college athletes are under the control of institutional personnel during travel for away games a cash alternative (up to $15 per meal) may be provided, but when college athletes are under the control of institutional personnel during home games this cash alternative cannot be provided.[235]

Given these complications, in any remaining jurisdictions where the "voluntary and uncoerced" requirement is only satisfied when a cash alternative is available to the furnishing of a meal (if such jurisdictions even exist)[236] schools

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232 *See supra* note 223 and accompanying text.

233 NCAA, *supra* note 51, § 16.5.2.4.

234 *Id.*

235 *Id.* §§ 16.5.2.4.2–3.

236 *See* Marshall v. New Floridian Hotel, Inc., No. 77-cv-1028, 1979 U.S. Dist. LEXIS 10122, at *29 (S.D. Fla. Aug. 29, 1979) (holding that since the employers "failed to provide their employees with an option to receive in cash the amounts attributed and claimed as a credit by defendants for meals" and other benefits, the "employee's acceptance of such meals, lodging or other facilities is not voluntary and uncoerced and thus such may not be considered 'furnished' under [§] 3(m).") As briefly discussed *supra* note 125, the Eleventh Circuit declined to address this argument, instead affirming the lower court's finding that the benefit was not creditable by the employer because the employers did not prove the reasonable costs under the fifth requirement. *See* Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 473 (11th Cir. 1982). However, the validity of the *Marshall* holding requiring a cash alternative is somewhat tenuous, since, as discussed, *see supra* notes 125–129 and accompanying text, one year after *Donovan,* the Eleventh Circuit held that the "voluntary and uncoerced" requirement was altogether inconsistent with the FLSA's text. Davis Brothers, Inc. v. Donovan, 700 F.2d 1368 (11th Cir. 1983). Oddly, the only case that has followed *Marshall*'s reasoning was also the Southern District of Florida, despite the Eleventh Circuit's rejection of the voluntariness requirement in general. *See* Robles v. Acebo Roofing, No. 16-cv-21817, 2017 U.S. Dist. LEXIS 33137, at *25–26 (S.D. Fla. Mar. 7, 2017). *Lopez v. Rodriguez*, 668 F.2d 1376 (D.C. Cir. 1981), acknowledged *Marshall*'s "even stricter test of voluntariness under 29 C.F.R. § 531.30," but distinguished it on the facts, and *Roces v. Reno Housing Authority*, 300 F. Supp. 3d 1172, 1186 (D. Nev. 2018), also cited *Marshall*, but followed *Lopez*'s different application of the voluntariness element, 668 F.2d at 1380, instead. All that being said, the jurisdictions that still require a cash alternative to meals may simply be the Southern District of Florida—and even that court may not require a cash alternative if applicable Eleventh Circuit precedent is followed.

may not be able to satisfy this requirement and credit meals during these times where a cash alternative is not available. This may not necessarily be true in all cases; it is entirely possible that the court will look at the totality of the circumstances (i.e. whether a cash alternative is available at all) instead of specifically looking to each meal to determine whether that specific meal would be creditable. Given the inane specificity of the NCAA regulations, it stands to reason that comparable case law where an employer provided meals with such restrictions cannot be found.

For all other jurisdictions, however, the "voluntary and uncoerced" requirement would likely be satisfied in all cases. Under the *Lopez* test,[237] which looks first to whether acceptance of the benefit is a necessary condition of employment and second to whether the employee knew of this essential requirement ahead of time and voluntarily accepted the job anyway, it seems clear that the meals provided to college athletes would be considered voluntarily accepted. The acceptance of the meal benefit in lieu of wages is certainly a necessary condition of employment as a college athlete, as under NCAA regulations, college athletes cannot simply choose to receive a cash alternative in all cases. Further, team trainers often prescribe nutrition plans and require college athletes to follow them,[238] which adds an additional necessity towards the college athletes taking meals from their employers. As for the second element, college athletes certainly know going into the job that they will need to take meals in lieu of wages; it is an unquestionable part of being a college athlete, and the prescribed meal plans are likely appreciated by athletes looking to get stronger and faster.

Of course, in jurisdictions that have abolished the "voluntary and uncoerced" requirement entirely, meals would be easily creditable without any sort of dispute given the ease in which the other four requirements are satisfied in relevant context. As such, except for the extremely rare common law requirement where cash must be provided as an alternative to a meal, the furnishing of meals to college athletes will almost certainly be creditable under § 3(m) of the FLSA.

C. Athletic Scholarships

While athletic scholarships and other tuition-related benefits may be seen as something of an odd application for § 3(m), the DOL interpretative regulations specifically lists "tuition furnished by a college to its student employees" as an example of an applicable "other facilit[y]" that is eligible for

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237 *Lopez*, 668 F.2d at 1380; *see supra* notes 122–124 and accompanying text.

238 *See, e.g.*, Toni M. Torres-McGehee, Kelly L. Pritchett, Deborah Zippel, Dawn M. Minton et al., *Sports Nutrition Knowledge Among Collegiate Athletes, Coaches, Athletic Trainers, and Strength and Conditioning Specialists*, 47 J. ATHLETIC TRAINING 205 (2012).

wage credit should the five requirements be met.[239] Indeed, in recent years, the grant of tuition credit as a benefit for employment has become fairly common across major corporate employers for all levels of their employees. Companies providing tuition reimbursement for employees' master's in business administration degrees is a common practice as a benefit provided to young executives,[240] and several companies—including, for example, Starbucks, Walmart, and Amazon—have recently established programs to allow entry-level employees to pursue discounted or free bachelor's degrees.[241] While these programs have been criticized for shepherding students to certain degree programs at partner institutions,[242] they have become a common way for employers to both provide extra incentives for employees to want to work for them and for the employers to provide extra training to their workforce.

For the purposes of the five DOL requirements, however, there are key distinctions between tuition-assistance programs at private sector employers like Starbucks and Walmart and the tuition benefits provided to college athletes by NCAA institutions. A district court in Tennessee recently drew a distinction between "tuition furnished by a college to its student employees" under the federal guidelines and tuition furnished by other employers to employees, finding that a supermarket chain's Tuition Reimbursement Program could not be creditable towards FLSA wages because the program—unlike the "other facilities" listed as examples of creditable benefits in the interpretative regulations—was not an "in-kind benefit[] offered by employers at the employers' facilities" as the tuition was not something that was provided at the employer's facility.[243] But while that substantial limitation to the use of tuition as a creditable benefit hurts private sector employers like Starbucks, Amazon,

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239 29 C.F.R. § 531.32(a) (2020).

240 *See generally, e.g.*, TK McDonald, *10 Companies That Will Help Pay for Your MBA*, INVESTOPEDIA (Apr. 5, 2019), https://www.investopedia.com/articles/insights/061416/10-companies-will-pay-your-mba-bac-wfc.asp.

241 *See generally, e.g.*, Abigail Hess, *Amazon Will Pay up to $12,000 for Employees To Study These 4 Fields*, CNBC (Apr. 19, 2018, 2:59 PM), https://www.cnbc.com/2018/04/19/amazon-will-pay-up-to-46000-for-employees-to-study-these-4-fields.html; Charisse Jones, *Walmart's Expanding the Chance To Go to College for a Dollar a Day to More of Its Workers*, USA TODAY (June 4, 2019, 9:20 AM), https://www.usatoday.com/story/money/2019/06/04/walmarts-helping-more-employees-earn-degree-dollar-day/1331179001/; *Starbucks College Achievement Plan Program Document*, STARBUCKS, https://starbucks.asu.edu/documents/program.pdf (last visited Oct. 1, 2020).

242 *See, e.g.*, Kelia Washington, *Starbucks, Walmart, and Amazon Offer "Free" College—But Read the Fine Print*, CENTURY FOUND. (Oct. 15, 2018), https://tcf.org/content/commentary/starbucks-walmart-amazon-offer-free-college-read-fine-print/?agreed=1.

243 White v. Publix Super Mkts., No. 3:14-cv-1189, 2015 WL 4949837, at *8 (M.D. Tenn. Aug. 19, 2015).

and Walmart, it would pose no issue to NCAA institutions, who are all colleges providing the tuition benefit "at [their] facilit[y]."[244]

While that case did not go through the five § 3(m) requirements and thus provides little guidance to applying those requirements to athletic scholarships, most of the requirements can be easily determined to be satisfied. For the second requirement, for instance, as with the optional tuition benefit programs provided by employers in more traditional industries, it cannot be argued that college athletes' acceptance of scholarship benefits is not "voluntary and uncoerced"—both under traditional meanings of the phrase and under the common law tests analyzing this requirement. As with the Starbucks tuition assistance program, which is strictly an "opt-in" program,[245] college athletes can, hypothetically, choose not to accept scholarship benefits and still perform the job of being a college athlete. NCAA college athletes obviously must remain academically eligible to participate in NCAA-sanctioned intercollegiate competition and that requires enrollment in an NCAA degree program.[246] And clearly, NCAA college athletes obviously have no opportunity to opt to receive the value of their college scholarship in cash rather than receiving the benefit of a college education.[247] But a distinction must be made here between the NCAA forcing college athletes to be students and forcing college athletes to be on scholarship: a college athlete can do one without the other.

Once again, the test derived from the D.C. Circuit's decision in *Lopez v. Rodriguez* is helpful in this situation, since—as the Eleventh Circuit has noted—the *Lopez* precedent is applicable "in the context of a job . . . that cannot be performed without the employee's partaking in the facility."[248] In *Lopez*, the D.C. Circuit found that if an employee understood that a position required partaking in a certain facility as a condition for employment, the voluntary and uncoerced acceptance of the position in general showed that the acceptance of the benefit was voluntary and uncoerced, leading to a two-part test: first, whether the benefit

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244 *Id.*

245 *See Starbucks College Achievement Plan Program Document*, *supra* note 241.

246 NCAA, *supra* note 51, § 14.01.2 ("To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain progress toward a baccalaureate or equivalent degree.").

247 *See* Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 473 (11th Cir. 1982) (finding that the refusal by the employers "to provide their employees with an option to receive cash in lieu of the meals and lodging with respect to which appellants claimed a credit" meant that "the employees' acceptance of such meals and lodging was not 'voluntary and uncoerced'"); Robles v. Acebo Roofing Corp., No. 16-cv-21817, 2017 U.S. Dist. LEXIS 33137, at *24–25 (S.D. Fla. Mar. 7, 2017) (holding as dispositive the plaintiffs' argument "that they were never given the opportunity to decide if they wished to receive the alleged lunches that they received in lieu of monetary wages").

248 Davis Brothers, Inc. v. Donovan, 700 F.2d 1368, 1372 (11th Cir. 1983).

is a necessary condition of employment; and second, whether the employee knew of this essential requirement ahead of time and voluntarily accepted the job anyway.[249]

While the *Lopez* test is more applicable to live-in service workers who are accepting housing at the worksite as a condition of their employment, the need for college athletes to accept tuition benefits as "a necessary condition of employment" is arguably applicable here. But while college athletes who accept scholarship benefits certainly do so with the knowledge that continued enrollment in degree programs is a necessary condition of employment, the application here is somewhat reversed; the benefit (the *scholarship*) itself is not a "necessary condition for employment," the enrollment in the college program is in general. Unlike live-in workers who are required by their employers to actually live on site, college athletes are not required to *receive a college scholarship* to be eligible to play; they need only to *be a college student*. This divide is demonstrated by the existence of "walk-on" athletes who pay for college on their own but are still eligible to play sports;[250] if college athletes wished, they could hypothetically decline to receive tuition benefits from their college and still be a college athlete eligible for NCAA participation. As such, the tuition benefits given to college athletes would pass the *Lopez* test and presumably the voluntary and uncoerced requirement as well.

Similarly, it is difficult to imagine any situation where the grant of an athletic scholarship to college athletes would somehow violate federal, state, or local law under the third requirement. Since in the context of lodging this requirement necessitates only that "the lodging itself comply with state law, not that lodging in general be a permissible form of compensation under state law,"[251] there would need to be some showing by a college-athlete plaintiff that the scholarship itself is not up to federal, state, or local code. Given that scholarships are generally not regulated in this fashion, that seems impossible. As such, the third requirement would be met for athletic scholarships.

By the same token, the fifth requirement would be easily satisfied for the same reason it was satisfied for housing and meal plans: universities can simply use what they charge other students for tuition to determine the value of the cost incurred in providing the benefit.

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[249] Lopez v. Rodriguez, 668 F.2d 1376, 1380 (D.C. Cir. 1981); *see also supra* notes 122–124 and accompanying text.

[250] *What Are the Different Types of Offers I Could Get?*, NEXT COLL. STUDENT-ATHLETE, https://www.ncsasports.org/recruiting/managing-recruiting-process/walk-on-vs-scholarship (last visited Sept. 7, 2020); *see also* Marie Becker, *The Walk-Ons*, HARV. POL. REV. (Feb. 24, 2017), https://harvardpolitics.com/online/50695/.

[251] Becker, *supra* note 250; *What Are the Different Types of Offers I Could Get?*, *supra* note 250.

By contrast, however, an argument could conceivably be made that the first requirement, that the benefit be regularly provided by the employer or similar employers, may not be satisfied. Under *Roces*, which held that only comparisons within the same "particular class of employee" can be used to argue under this requirement, the presence of several additional "classes" of college athletes who *do not* receive athletic scholarships would conceivably allow for a stronger case for college athletes than if the college athletes were to attempt to compare themselves to other university employees.[252] For example, sports outside of football and basketball often have much stricter limits on the amount of scholarships that can be offered to athletes even at larger Division I schools; for example, the NCAA limits all Division I baseball programs to a maximum of 11.7 athletic scholarships to be divided among a maximum of 27 players.[253] Even in high-revenue Division I football and basketball, scholarship limits make "walk-on" (non-scholarship) players quite common, and football and basketball players looking to participate in the highest levels of college sports will often select a walk-on offer with a top program over a scholarship offer at a lower-tier team so they can receive better training and compete at a higher level of competition.[254] Additionally, college athletes participating in Division III[255] and Ivy League[256] sports do not receive athletic scholarships as a matter of rule.

A significant question exists as to whether non- or partial-scholarship athletes exist within the same "particular class of employee" as Division I scholarship athletes. In *Roces*, the court was skeptical of the idea that the FLSA or the applicable regulations "support so strict a requirement that employers must provide lodging to all of their employees, regardless of the disparate duties associated with different positions, in order to take any credit against wages based on the reasonable cost of such lodging."[257] But a difference here exists as

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[252] *See supra* notes 111–115 and accompanying text.

[253] Dirk Chatelain, *With Scholarship Limit, College Baseball Careers Come with a Cost*, OMAHA WORLD-HERALD (July 10, 2016), https://www.omaha.com/sports/with-scholarship-limit-college-baseball-careers-come-with-a-cost/article_9c27f775-3564-5051-b7f9-f258c8c37fd1.html.

[254] *See* Kyle Winters, *NCSA: What Is a Preferred Walk-On?*, USA TODAY (Dec. 19, 2018), https://usatodayhss.com/2018/ncsa-what-is-a-preferred-walk-on.

[255] Deborah Ziff Soriano & Emma Kerr, *4 Myths About Athletic Scholarships*, U.S. NEWS (June 5, 2019, 9:08 AM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-10-04/4-myths-about-athletic-scholarships (noting that "Division III schools do not award athletic scholarships, but they do grant other forms of financial aid").

[256] *Prospective Athlete Information*, IVY LEAGUE (July 28, 2017), https://ivyleague.com/sports/2017/7/28/information-psa-index.aspx ("Ivy League schools provide financial aid to students, including athletes, only on the basis of financial need as determined by each institution's Financial Aid Office. There are no academic or athletic scholarships in the Ivy League."); *see also* Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring) ("Like other Ivy League schools, Penn does not offer athletic scholarships.").

[257] Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1185 (D. Nev. 2018).

college athletes would not be arguing that they are in the "same class of employees" as other university employees or even other employees in the athletic department; the relevant comparison is other college athletes, who perform largely the same job responsibilities—often even playing in the same sport as scholarship college athletes.

Under the relevant case law, walk-on athletes would likely not be appropriate for comparison here; in *Herman v. Collis Foods*,[258] the Sixth Circuit affirmed a district court holding that "customarily furnished" merely meant that the enforcement and implementation of a benefit plan cannot be "hypothetical."[259] By the same token, walk-on players' voluntary rejection of scholarship offers at other schools would not render the benefit as not regularly provided to other college athletes, since other college athletes on the same team are still taking advantage of the school providing the benefit.

However, there remains an open question of law regarding the comparison to other non- or partial-scholarship college athletes. As the Sixth Circuit noted in *Herman*, "there is little authority interpreting the term 'customarily furnished.'"[260] By the same token, no authority (outside of the vague "particular class of employees" definition in *Roces*) could be found that provides a clear demarcation of how to delineate between particular classes of employees. By that token, attempting to distinguish between classes of employees as convoluted as different "classes" of college athletes in NCAA for the purpose of this requirement is entirely unsettled. The similar job responsibilities of the college athletes would seemingly favor a finding that the college athletes are of the same class, but the differences in revenue generation would point to the opposite conclusion. Until a court makes such a ruling, predicting how a court may rule on the first requirement for athletic scholarships may be impossible.[261]

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258 176 F.3d 912 (6th Cir. 1999).

259 *Id.* at 919.

260 *Id.*

261 The concurrence in *Berger*, 843 F. 3d at 294 (Hamilton, J., concurring), may provide *some* guidance here. Judge David F. Hamilton clearly felt that there may be a difference between scholarship and non-scholarship college athletes in regard to employment status, at least at the lenient motion to dismiss stage. If followed, Judge Hamilton's delineation here may end up proving to be something of an end-around answer to this question, as defining "particular classes of employees" would be extremely simple if only Division I scholarship college athletes playing revenue sports were found to be employees under the FLSA as a threshold matter. *See* Ehrlich, *supra* note 4, at 99–102 (arguing that if Judge Hamilton's concurrence was followed in future FLSA cases, college athletes in certain revenue sports would be considered employees, while college athletes in so-called non-revenue sports would not). However, Judge Hamilton's concurrence is entirely nonbinding authority; the district court in *Dawson v. NCAA* for instance completely shot down the idea that Judge Hamilton's opinion can be relied upon to any extent. 250 F. Supp. 3d 401, 406 (N.D. Cal. 2017), *aff'd on other grounds*, 932 F.3d 905 (9th Cir. 2019). *See*

Even more damningly, the fourth requirement—the need for the benefit to primarily benefit the employee, rather than the employer—may even be fatal to any institution's attempt to claim these scholarships as creditable wages. The reason for this is simple: while college scholarships obviously have benefit to college athletes, the NCAA member institutions—and the NCAA and its conferences on behalf of these institutions—almost certainly derive substantially more benefit from scholarships than the college athletes receive.

The *Brennan* precedent is revealing in this situation. As the Texas district court noted in *Brennan*, the benefit of a car salesman being afforded a company car was clearly for the benefit of the employer—even despite the rampant personal use of the car by the employee—since "[t]he very nature of [the employee's] duties as a car salesman would require his possession and use of an automobile, even on personal business, and . . . the business of his employer would suffer if this were not the case."[262]

While a college scholarship is almost certainly more valuable to a college athlete than a loaner car is to a car salesman,[263] the benefits of a college athlete being on scholarship to the NCAA institution that gives it to him are clear as well. Member institutions habitually use the purported benefits of the free college education provided to college athletes as both a marketing tool[264] and a shield from unfavorable litigation,[265] and college scholarships are a necessary

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supra notes 31-33 and accompanying text. To the contrary, this district court found that "Judge Hamilton did not consider, much less find, that football players are 'employees' under [the] FLSA" and instead merely "stated, in passing, that he is 'less confident' that Berger's broad holding extends to students who receive athletic scholarships to participate in 'so-called revenue sports.'" *Id.* The Ninth Circuit did not address Judge Hamilton's concurrence on appeal, and Judge Hamilton's concurrence was similarly ignored in both decisions in *Livers*. As such, Judge Hamilton's delineation between revenue and non-revenue sport athletes under the FLSA rests on extremely tenuous ground and thus likely cannot be seriously relied upon for this or any other legitimate legal purpose.

[262] 363 F. Supp. 327, 333 (N.D. Tex. 1973); *see also supra* notes 172–174 and accompanying text.

[263] Depending, of course, on the car in question.

[264] *See, e.g.*, *Academics*, NCAA, http://www.ncaa.org/about/what-we-do/academics (last visited Sept. 7, 2020); NCAA (@NCAA), TWITTER (Mar. 24, 2018, 5:01 PM), https://twitter.com/ncaa/status/977651518060072960 ("Only 2% of student-athletes go pro – that's why academics come first. Learn how college sports opens doors for student-athletes . . . ."); NCAA, *PSA-Student-Athlete*, FACEBOOK (Mar. 17, 2019), https://www.facebook.com/ncaa1906/videos/2288599118096527/.

[265] *See, e.g.*, Brief for Defendant at 6–12, *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020) (Nos. 19-15566, 19-15662); Brief for Appellant at 6–7, Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (No. 17-15973); Brief for Appellee at 13–17, Deppe v. NCAA, 893 F.3d 498 (7th Cir. 2018) (No. 17-1711); Brief for Appellant at 11–13, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2014) (Nos. 14-16601, 14-17068). Even beyond litigation specifically targeting the NCAA and/or member institutions, the NCAA also frequently uses the benefits it offers to college athletes as a shield from unfavorable litigation against other parties,

component to an athletic program being competitive on the recruiting market. Without scholarships, the athletic program would be wholly unable to lure the best high school recruits, and therefore would fail to be competitive on the field of play, significantly hurting the program's potential to receive ticket revenue, sponsorship and television revenue, donations from alumni and other fans, and, in football, bowl game proceeds.[266] Clearly, without the grant of that benefit "the business of [the college athletes'] employer would suffer" immensely.[267]

Obviously, the benefits of scholarships to colleges and universities on the recruiting market are similar to what is achieved by any employer advertising any benefits as part of a job offer. A failure by a college athletic program to attract strong recruits is functionally the same as the failure of any employer to attract strong employees. This perhaps does make it more difficult to argue that not granting college scholarships to recruits would be "primarily for the benefit of the [employer]" and "necessary to the conduct of [the employer's] business."[268]

But even more damning to the NCAA member institutions argument here is the simple fact that college athletes are required to maintain academic status in order to participate in NCAA competitive events.[269] Regardless of the benefit afforded to college athletes of a free or discounted college education, Division I NCAA athletic programs need to give their college athletes college scholarships in order to field a competitive team. A team filled purely with the select walk-ons who can pay tuition on their own would not be competitive, especially given studies finding that most of the top athletic recruits in revenue sports come from low-income backgrounds whose families would almost

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including challenges to rules by professional sports leagues that effectively require some time in college before becoming a professional athlete. *See, e.g.*, Brief for the NCAA as Amicus Curiae Supporting Petitioner at 1–4, Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004) (No. 04-0943) (arguing as amicus curiae the benefits of the educational opportunities afforded to college athletes in a challenge to the NFL's rule forbidding athletes from entering the NFL Draft until three years after their high school graduation).

266 *See* Stephen A. Bergman & Trevon D. Logan, *The Effect of Recruit Quality on College Football Team Performance*, 17 J. SPORTS ECON. 578, 597 (2014) (finding that a five-star recruit is worth more than $150,000 to a school given the increased likelihood of appearing in BCS bowl games, "which nets a school US$4 million dollars above their conference-allotted share of the revenue").

267 Brennan v. Mod. Chevrolet Co., 363 F. Supp. 327, 333 (N.D. Tex. 1973).

268 *Id.*

269 *See* NCAA, *supra* note 51, § 14.01.2 ("To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain progress toward a baccalaureate or equivalent degree.").

certainly not be able to afford the high costs of college tuition on their own.[270] In that regard, the grant of college scholarships are certainly for the benefit of the employer institution, as providing college athletes with college scholarships is the mechanism that allows a school to field athletic programs that are both competitive and academically eligible in NCAA-sanctioned competition. While one can certainly argue that removing scholarships across all NCAA sports would not affect competitive balance (as, in that case, *no* schools would be able to offer scholarships), looking simply at the micro-level of a singular employee–employer relationship, the scholarship is certainly to the employer's benefit because it effectively functions as a "license" to play college sports under NCAA rules.[271]

A comparable opinion is *Adoma v. University of Phoenix*,[272] a 2011 case where an online university employer attempted to credit a tuition benefit offered to employees for the purposes of calculating employees' regular pay for the payment of overtime under California law.[273] The parties settled prior to the court determining whether the tuition benefits offered by the university were either for the benefit of the employee or the employer. However, the court did indicate in a motion for summary judgment on the limited question of whether tuition benefits were creditable in general, that in applying the FLSA and the DOL's applicable interpretive guidelines, "a tuition benefit is not compensation for work, and may thus be excluded from the regular rate of pay, where it primarily benefits the employer."[274] The court also indicated its leanings towards a finding that the tuition benefits were primarily for the benefit of the employee and thus creditable, noting that under the program "employees can earn credits towards a degree, take courses in any subject area, and potentially, increase their earning potential by doing so."[275]

But while that finding may seem to lean towards the creditability of similar tuition benefits from universities to college athletes, there are some key distinctions between the *Adoma* case and athletic scholarships. First, while the court noted in *Adoma* that the University of Phoenix employees could "take courses in any subject area" under their tuition programs, all factual indications in college sports suggest the opposite.[276] Even though there are no NCAA

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270 *See, e.g.*, Rachel Allison, Adriene Davis & Raymond Barranco, *A Comparison of Hometown Socioeconomics and Demographics for Black and White Elite Football Players in the US*, 53 INT'L REV. SOCIO. SPORT 615 (2018).

271 *See infra* notes 285–291.

272 779 F. Supp. 2d 1126 (E.D. Cal. 2011).

273 *Id.* at 1128.

274 *Id.* at 1137.

275 *Id.* at 1138.

276 *Id.*

restrictions on the degree programs college athletes may take at member institutions, NCAA rules impose strict degree-progress requirements that a 2014 *Pittsburgh Post-Gazette* report noted have been criticized for leading to college athletes being "steered" towards certain majors by coaches or athletic departments.[277] For example, the *Post-Gazette* pointed to former Northwestern quarterback and unionization ringleader Kain Colter, who testified to the National Labor Relations Board that an advisor told him he could not take a chemistry class needed for his preferred pre-med major because it would interfere with his football obligations.[278] To a much larger magnitude, an investigative report into the University of North Carolina ("UNC") by former U.S. Department of Justice official Kenneth Wainstein found that UNC college athletes were pushed into GPA-boosting "paper classes" within the African-American Studies major by academic advisors where these advisors suggested to the professor what grade to award the players taking her classes.[279]

Even in more innocent cases, the *Post-Gazette* found evidence of the phenomenon known as "clustering," where "25[%]or more of an athletic team are in the same major."[280] Surveying the online biographies of 1,668 college

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[277] Mark Dent, Michael Sanserino & Sam Werner, *Do Colleges Drop the Ball with Student-Athletes?*, PITTSBURGH POST-GAZETTE (May 31, 2014, 10:58 PM), https://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120.

[278] *Id.*

[279] Jon Solomon, *UNC Investigation: Athletes Pushed into Fake Classes by Counselors*, CBS SPORTS (Oct. 22, 2014, 10:36 AM), https://www.cbssports.com/college-football/news/unc-investigation-athletes-pushed-into-fake-classes-by-counselors/. *See generally* McCants v. NCAA, 201 F. Supp. 3d 732, 736–37 (M.D.N.C. 2016) (detailing the UNC "paper classes" scandal in dismissing a class action lawsuit filed by former UNC basketball player Rashanda McCants and football player Devon Ramsay against the NCAA for alleged negligence and breach of fiduciary duty in not overseeing UNC to the degree necessary to stop the academic fraud).

[280] Dent et al., *supra* note 277. *See generally* Bob Case, H. Scott Greer & James Brown, *Academic Clustering in Athletics: Myth or Reality?*, 11 ARENA REV. 48 (1987) (defining and exploring the phenomenon of academic clustering in college sports). Academic clustering has been a regular source of study within the sport management literature, with several published studies finding significant evidence of academic clustering. *See, e.g.*, Jeffrey J. Fountain & Peter S. Finley, *Academic Majors of Upperclassmen Football Players in the Atlantic Coast Conference: An Analysis of Academic Clustering Comparing White and Minority Players*, 2 J. ISSUES INTERCOLLEGIATE ATHLETICS 1 (2009) (finding that at six surveyed schools at least 75% of minority football players were enrolled in just two academic majors); Derek A. Houston & Lorenzo D. Baber, *Academic Clustering Among Football Student-Athletes and Exploring Its Relationship to Institutional Characteristics*, 11 J. STUDY SPORTS & ATHLETES EDUC. 66 (2017) (surveying the prevalence of academic clustering among football student-athletes at 60 Division I football programs); Amanda L. Paule-Koba, *Gaining Equality in All the Wrong Areas: An Analysis of Academic Clustering in Women's NCAA Division I Basketball*, 16 INT'L J. SPORT MGMT. 1 (2015); Ray G. Schneider, Sally R. Ross & Morgan Fisher, *Academic Clustering and Major Selection of Intercollegiate Student-Athletes*, 44 COLL. STUDENT J. 64 (2010) (surveying a total of 424 junior

athletes at several universities, the *Post-Gazette* found that several college teams had large quantities of college athletes in the same major, including finding that 64.7% of the college athletes with declared majors on the University of Pittsburgh football team were either enrolled in the administration of justice major or in communications.[281] The *Post-Gazette* also pointed to a survey conducted by Bowling Green University sport management professor Amanda Paule-Koba, who found that among 600 surveyed college athletes at Big Ten and Mid-American Conference schools, 29.9% of them did not have majors that matched their career aspirations.[282] These findings paint a wildly different picture of the concept of college-athlete choice in major from the University of Phoenix employees in *Adoma*, who were wholly unrestricted in what degree they could pursue using their afforded tuition benefits.

But even further distinguishing the instant situation from the facts in *Adoma* is the idea that college athletes are *required* to remain in degree programs to maintain their NCAA eligibility and their athletic scholarships. The *Adoma* court noted that the University of Phoenix did derive some benefit from the tuition program as "its counselors may be better able to provide information to students if they are also taking courses with the university."[283] Even that small benefit—which parallels somewhat with the benefits received by the car dealership in *Brennan*—was enough for the court to wait until further discovery was conducted to make a final determination on the balance of benefits between the employer and employee. But the *Adoma* plaintiffs were not required to take advantage of the degree program if they did not want to, as they—unlike the college athletes—did not need to take classes to remain employed at the University of Phoenix. While the University of Phoenix did derive some benefit from their employees taking these classes, the job description of the employees did not require them to take classes to remain employed.[284] So, while the tuition benefits were still a question to be weighed in *Adoma*, the tuition benefits afforded to college athletes are much more like the company car given to the car salesman in *Brennan*.

Indeed, a perfect comparison case may be found not involving college tuition, but in *Lilley v. IOC-Kansas City*,[285] an opinion issued in November 2019 stating that a gaming license required by the Missouri Gaming Commission for employees to work casino floors could not be credited towards minimum wage

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and senior football players across 12 different institutions and finding significant evidence of academic clustering).

281 Dent et al., *supra* note 277.

282 *Id.*

283 Adoma v. Univ. of Phx., 779 F. Supp. 2d 1126, 1138 (E.D. Cal. 2011).

284 *See id.* at 1139.

285 No. 4:19-cv-00553, 2019 WL 5847841 (W.D. Mo. Nov. 7, 2019).

and overtime.[286] In this case, the defendant had made two primary arguments that the license primarily benefited the employee: first, that the Missouri Gaming Commission—rather than the casino itself—required the license; and second, that the license was portable in that it allowed employees to work at other Missouri casinos.[287] However, the court dismissed those arguments, holding that the payment of the license fee must be considered to the primary benefit of the employer since "the gaming license fee is a cost arising from employment and not arising in the ordinary course of life."[288]

While it seems odd—and perhaps even sacrilegious—to compare college scholarships to the fees paid by a casino for an employee's gaming license, the comparison makes sense when considering that by NCAA "licensing" regulations, a college scholarship is, essentially, *the payment by the college for the college athlete's license to play college sports*. In the same way that casino workers in Missouri need a license to be eligible work the casino floor, college athletes must be enrolled in a degree program to be eligible to play college sports. As such, this degree program is essentially the license that college athletes need to "work" in the capacity to which they are "employed" by colleges and universities (playing college sports).

While the school can certainly point to the many benefits of a college degree for college athletes, this argument principally parallels the same argument made by the casino employer in *Lilley*: that the license's portability was a benefit received by the employee, which outweighed the benefits given to the casino. The court rejected that argument. There is still some distinction here; the employees in *Lilley* argued persuasively that they "ha[d] no use for their gaming license in the ordinary course of life outside the workplace," and college athletes successfully completing degree programs certainly (hopefully) have use for their college degrees in their ordinary life after they have completed their services as an NCAA-sanctioned college athlete.[289] But DOL regulations seemingly suggest that the analysis here is one of a presumption, rather than a straight balancing test. According to Fact Sheet 16 of the DOL guidelines, if a uniform "is required

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[286] *Id.* at *8; *see also* Lockett v. Pinnacle Ent., 408 F. Supp. 3d 1043, 1047–49 (W.D. Mo. 2019) (also finding in a case with similar facts to *Lilley* that a gaming license mandated by State law for employees to work casino floors could not be credited towards minimum wage and overtime because it primarily benefited the employer, not the employee).

[287] *Lilley*, 2019 WL 5847841, at *3.

[288] *Id.*; *see also* Arriaga v. Fla. Pac. Farms, 305 F.3d 1228, 1242–43 (11th Cir. 2002) (noting a "consistent line being drawn between those costs arising from the employment itself and those that would arise in the course of ordinary life"); Williams v. Secure Res. Commc'n Corp., No. 11-cv-03986, 2013 WL 4828578, at *6 (S.D.N.Y. Sept. 10, 2013) ("Professional licensing costs arise out of employment rather than the ordinary course of life. They therefore primarily benefit the employer, not the employee, and are not deductible to the extent that they bring an employee's pay below the minimum wage.").

[289] *Lilley*, 2019 WL 5847841, at *3.

by some other law, the nature of the business, or by an employer, the cost and maintenance of the uniform is considered to be a business expense of the employer."[290] The court in a parallel case to *Lilley* found this guideline to "suggest[] that a gaming license is for the benefit of the employer as it is required by State law and is necessary for the employee's work."[291] Similarly, since the enrollment in a degree program is required for college athletes by both the employer and the nature of the college sports "business," the payment for that degree program by virtue of a college scholarship would likely similarly be found to be for the primary benefit of the employer, rather than the college-athlete employees.

As such, even though the "voluntary and uncoerced" requirement is likely satisfied, it seems unlikely that NCAA institutions would be able to credit college tuition benefits afforded to college athletes towards FLSA wage requirements. Because that tuition primarily benefits the school, rather than the college athletes themselves, these in-kind benefits likely would not be considered "wages" under § 3(m) of the FLSA.

D. Other Benefits

As outlined in Section I.B of this Article, the benefits afforded to college athletes by their "employer" universities are extensive and varied[292]—especially if Judge Wilken's injunction forbidding restraint of education-related compensation is affirmed on appeal at the Ninth Circuit.[293] For the purpose of simplicity, this Article focuses mainly on the three primary benefits of housing, meals, and athletic scholarships. However, many other benefits can also be analyzed under the same principles as those applied in the discussion of those three primary benefits.

For example, commentators arguing that college athletes are "already paid" commonly point to the athletic training and academic advising that college athletes are afforded, which obviously makes them quite distinguishable from other students on campus.[294] However, these benefits would likely not be creditable for the same reason that this Article found that athletic scholarships would not be creditable. As noted, Fact Sheet 16 of the DOL guidelines states that if a uniform "is required by some other law, the nature of the business, or by an employer, the cost and maintenance of the uniform is considered to be a

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290 WAGE & HOUR DIV., U.S. DEP'T OF LAB., FACT SHEET #16: DEDUCTIONS FROM WAGES FOR UNIFORMS AND OTHER FACILITIES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (July 2009), https://www.dol.gov/whd/regs/compliance/whdfs16.htm.

291 *Lockett*, 408 F. Supp. 3d at 1048.

292 *See, e.g.*, *supra* notes 54–63 and accompanying text.

293 *See* Permanent Injunction, *supra* note 53, at 2; *see also* sources cited, *supra* note 48.

294 *See, e.g.*, Dorfman, *supra* note 1; Clark, *supra* note 1.

business expense of the employer."[295] Athletic training is certainly a benefit that is required by both the nature of the business and by the employer, as the athletic department has an obvious vested interest in ensuring that college athletes remain in top shape so they can perform at their best on the field of play. Similarly, academic advising is unquestionably primarily in place to ensure that college athletes remain academically eligible and thus able to participate in games. These benefits—while certainly providing some benefit to the college athletes themselves—are unquestionably in place for the primary benefit of the athletic department and thus cannot be creditable towards minimum wage and overtime under § 3(m).

On the other hand, other benefits would clearly be creditable by colleges and universities. The medical coverage granted to college athletes for sports-related injuries would be similar to health-care benefits often granted to employees working in many other industries; indeed, health insurance is an enumerated benefit considered as part of the "regular rate" of pay under the FLSA statutory text.[296] Other benefits like game tickets[297] and money for "essential needs" under the NCAA Student Assistance Fund[298] are both clearly creditable, as they are completely voluntary for college athletes to either take or leave and provide little benefit to the employer. Similarly, access to the NCAA Degree Completion Award Program—while similar in function to awarding a college scholarship while the college athlete is still playing—would be creditable, as unlike the traditional athletic scholarship, it is both a voluntary program for college athletes and something that schools derive no benefit from, since the college athletes are not participating in sports while they are completing their degree under that program.[299]

V. CONCLUSION

As this Article has demonstrated, while under § 3(m) colleges and universities can likely show in court that college athletes are—as so many commentators have argued—"already paid" based on the provision of housing, meals, and certain other in-kind compensation, not all of these benefits would count as "pay" under the federal wage and hour law.[300] Indeed, this Article has shown that the big-ticket item that is most frequently relied upon as the major benefit provided to college athletes—the college scholarship—would most likely

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295 U.S. DEP'T OF LAB., *supra* note 290.

296 29 U.S.C.A. § 207(e)(4) (West 2020).

297 *See* Allen, *supra* note 55 and accompanying text.

298 *See* McCoy, *supra* note 60 and accompanying text.

299 *See NCAA Division I Degree Completion Award Program*, *supra* note 63 and accompanying text.

300 *See supra* Sections IV.A, IV.B, and IV.D.

not be considered to be wages under the FLSA.[301] Since the in-kind compensation rules written into the FLSA were primarily written to ensure that workers are actually being paid cash where appropriate and only given benefits that do actually primarily "benefit" them (instead of their employers), a benefit that is clearly given just to help schools recruit students who can abide by NCAA rules requiring progress towards a degree program to remain eligible for athletic competition would likely not be creditable as in-kind compensation.

However, this Article functions as only one step in a long progress towards determining the future of college-athlete compensation. Obviously, the premise of this Article is predicated on the idea that college athletes will someday be declared by the courts to legally be employees under the FLSA. While the track of FLSA case law involving college athletes seems to be moving slowly towards this possibility,[302] the prospect of college-athlete employment is by no means an inevitable conclusion. Indeed, it seems likely that the NCAA has engaged in lobbying to exempt college athletes from the FLSA (as well as antitrust law) based on the exceedingly broad nature of amateurism protection in Senator Marco Rubio's NCAA-backed bill regarding college-athlete compensation for name, image, and likeness considerations.[303]

Still, this Article provides valuable insight into the steps that must be taken in order to conform the current "collegiate model"[304] to a viable employment model under federal wage and hour law. Should college athletes be

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301 *See supra* Section IV.C.

302 *See supra* Section II.A.

303 Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020), https://www.rubio.senate.gov/public/_cache/files/3d74b6f6-1a30-476b-972d-4fa1373fc175/9927A4579D2EF8B6D9D71AC9D6ADEFB9.rubio—fairness-in-collegiate-athletics—6-16-2020.pdf. Section 4(b) of the proposed legislation states that "no cause of action shall lie or be maintained in any court against any intercollegiate athletic association, or any institution of higher education which is a member of such association for the adoption or enforcement of a policy, rule, or program established" under the bill. *Id.* at 6. According to Rubio, this language is intended to provide "safe harbor" for the NCAA's implication of policies, which the bill states must preserve the "amateur status" of college athletes. Press Release, Marco Rubio, U.S. Sen., U.S. Senate, Rubio Introduces Legislation To Address Name, Image, Likeness in College Sports (June 18, 2020), https://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-introduces-legislation-to-address-name-image-likeness-in-college-sports. The bill has been criticized by legal scholars and college-athlete advocates in part due to the broad nature of the exemption afforded to the NCAA. *See, e.g.*, Marc Edelman, *Marco Rubio's Fairness in Collegiate Athletics Act Is Anything but What Its Name Implies*, FORBES (June 22, 2020, 10:00 AM), https://www.forbes.com/sites/marcedelman/2020/06/22/marco-rubios-fairness-in-collegiate-athletics-act-is-anything-but-what-its-name-implies/#6f63ad104776; *College Athletes Should Give U.S. Senate NIL Bill a Failing Grade: Criticism of the Fairness in Collegiate Athletics Act*, DRAKE GRP. (June 24, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/06/Drake-Position-on-Rubio-NIL-Bill-FINAL.pdf.

304 *See supra* note 5 and accompanying text.

treated as employees under federal law, determining the legality and the extent of the compensation already afforded to college athletes under current circumstances will become vitally important to determining damages and the model of college-athlete compensation moving forward. In this regard, this Article serves as a necessary first step in that analysis and calls for further scrutiny of the college-athlete compensation model as we move into a new era of college-athlete rights.